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No._____

Supreme Court of the United States

October, 1983

Ellis Wayne Felker

Petitioner

v.

State of Georgia

Respondent

On Writ or Certiorari to the Supreme Court of Georgia

Petition for Writ of Certiorari

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16788

IN THE SUPREME COURT OF THE UNITED STATES

October, 1983

No. _____

ELLIS WAYNE FELKER :

Petitioner :

vs. :

STATE OF GEORGIA, :

Respondent :

This is a petition for writ of certiorari to the Supreme Court of Georgia.

PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

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Petitioner prays for writ of certiorari to issue to the Supreme Court

of Georgia. This petition is made pursuant to Rule 21 of this Court.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are as follows:

(1) Whether petitioner's acquittal of an extrinsic offense of rape prohibits use of the extrinsic offense under the doctrine of collateral estoppel embodied in the double jeopardy clause of the Fifth Amendment of the United States Constitution.

(2) Whether the requirement of a neutral and detached magistrate mandated by the Fourth Amendment to the United States Constitution is offended by a magistrate whose financial position is dependent upon the number of warrants he issues and whose activities are intricately entangled with those of law enforcement officials as evidenced by the

following facts:

(a) Magistrate issued series of search warrants while a visitor to the police office. Magistrate sat in the police visitor's chair while the requesting officer sat at the police desk.

(b) Magistrate spent several hours at the police station listening to police colloquy about the case during an interim period between the issuance of several of the warrants.

(c) Magistrate refused to give copies of the search warrants and supporting affidavits to defense counsel. Said refusal was in obeyance to a policy set by the office of the district attorney which district attorney's policy the magistrate felt obligated to follow.

(d) Magistrate went to a search site and observed for five minutes the execution of one of the first warrants

that he issued.

(e) Magistrate issued repetitive search warrants authorizing search of the same area authorized by previously executed search warrants even though previous searches produced no evidence of crime. The new warrants were not supported by any new facts.

(3) Whether probable cause required by the Fourth Amendment for issuance of search warrant was lacking as evidenced by the following facts comprising the totality of circumstances surrounding the issuance of the warrants:

(a) A consent search by police of appellant's house on the night victim was reported missing (which was prior to the issuance of the warrants) revealed no evidence of any crime.

(b) The items requested to be searched for in the affidavit and which

were authorized to be searched for in the warrant were not particularly described so as to advise a searching officer if and when he found the items authorized to be searched for.

(c) There was no showing as to how the items sought for were connected to the crime nor why the items should be found at the searched location.

(d) Issuance of the warrants was based on stale information. The last warrant which produced hairs which the state contends were culpatory was issued three months after the petitioner initially was arrested with no showing as to who had been in petitioner's house during the three months petitioner remained incarcerated.

(4) Whether a general search in violation of the Fourth Amendment is evidenced by the officers' seizure of

items not described in the warrant and not obviously connected to the crime.

(5) Whether the warrants were unlawfully obtained by withholding from the magistrate important facts germane to the existence or not of probable cause in violation of the due process clause of the Fourteenth Amendment and the Fourth Amendment right against unreasonable searches and seizures.

(6) Whether petitioner's Fourteenth Amendment right to due process of law has been violated by imposition of death penalty for a crime with insufficient evidence as to what happened to the victim, where it happened, when it happened, and at whose hands it happened.

(7) Whether petitioner's rights under the Eighth Amendment to the United States Constitution to be free of cruel and unusual punishment and his Fourteenth

Amendment right to due process have been violated by imposition of the death penalty where the victim was a young white attractive female, and under circumstances and lack of proof as to how, where, when and at whose hands the victim met her death so that such penalty would likely not have been imposed had the victim not been white.

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28 U.S.C. §1257(3) 1

OPINION OF THE SUPREME COURT OF GEORGIA BELOW IS DESIGNATED AS FELKER V. STATE, 252, GA, _____; 314 S.E.2d 621 (1984) CASE NUMBER 40350, GEORGIA SUPREME COURT. The opinion is reproduced in Appendix A. Decision dated March 15, 1984, Motion for re-hearing denied March 29, 1984.

JURISDICTIONAL STATEMENT

Petitioner received a sentence imposing the death penalty by the Superior Court of Houston County, Georgia after trial by jury which sentence was dated the 7th day of February, 1983. This sentence was confirmed by the Supreme Court of Georgia by decision rendered on the 15th day of March, 1984. Timely motion for re-hearing was denied by the Supreme Court of Georgia on the 29th day of March, 1984, which statement of denial changed two pages of the first opinion of the Supreme Court of Georgia.

This Court has jurisdiction to grant a writ of certiorari to the highest court of the State of Georgia pursuant to 28 U.S.C. §1257(3).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent portions of the following provisions of the United States Constitution are set out verbatim in Appendix D:

(1)(a) Fourth Amendment

(1)(b) Fifth Amendment

(1)(c) Eighth Amendment

(1)(d) Fourteenth Amendment

The following statutory provision is set out verbatim in Appendix D:

(2) O.C.G.A. §17-10-30(b)(2), (7)

CONCISE STATEMENT OF CASE

The victim was a young white female who was found dead in a creek in a remote area of Twiggs County, Georgia on December 8, 1981. Her body was found two weeks after she was reported missing. It is unknown as to where or when she meet her death within that two week period.

Petitioner freely admits having seen the victim on November 24, 1981, two weeks before her body was found. Respected local citizens claim to have seen her with males who were not the petitioner after she was reported missing. The police dispute the accuracy of these other witnesses.

Marks and other physical characteristics of the deceased body were consistent with, but not conclusive of the victim having suffered sexual abuse prior to meeting her death.

Evidence identifying petitioner was tenuous, circumstantial and limited to the following:

(1) Prior criminal activity of petitioner. He was charged with committing rape and aggravated sodomy in 1976. He was acquitted of rape, but convicted of aggravated sodomy.

(2) Petitioner admitted having been with the victim in petitioner's house and leather shop.

(3) Various hairs and cloth fibers found in petitioner's house and car were consistent with having come from the victim's body and clothes. They were equally as consistent with having other sources.

(4) Lewd drawings found in petitioner's house and shop depicted women in bondage, engaged in deviant sexual practices.

(5) An undated note found in the victim's car, in the victim's handwriting stated that the victim was going to Atlanta with "Wayne and some of his friends who are GS-11's on base". The note was signed by the victim. Petitioner's name is Wayne Felker.

In addition to murder for which appellant was found guilty and sentenced to death, appellant was tried for aggravated sodomy, false imprisonment, robbery, and rape. Petitioner was convicted of all charged crimes except robbery. The trial judge granted a directed verdict to petitioner as to robbery in that there was no evidence in support of this crime.

The two aggravating circumstances supporting the death penalty were a jury finding that the murder occurred during a commission of another capital crime, rape.

O.C.G.A. §17-10-30(b)(2). The second aggravating circumstance was a finding, pursuant to O.C.G.A. §17-10-30(b)(7), that the murder was outrageously or wantonly vile; horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

There was dispute as to whether or not the corpus delicti of rape was justified by the evidence. Evidence of the corpus delicti of rape, one of the two aggravating circumstances found by the jury to impose the death penalty, was as follows:

(1) The 1976 previous crime was introduced and was the gravamen of the evidence against the accused as to the existence of rape even though petitioner had been acquitted of that charge.

(2) No sperm or semen was found in the vaginal cavity.

(3) There was no internal damage to the vaginal wall or uterus.

(4) There were bruises on the external area surrounding the vagina which were consistent with sexual abuse, and which were equally consistent with post mortem decay. The test which would have distinguished between the two was not performed. There was no testimony that the vagina was dilated even though the district attorney attempted to elicit such testimony from the state's expert. V-11-435-436.

Petitioner was arrested on December 8, 1981, the same day the victim's body was found. The first three of eleven search warrants were executed on the following day. The last search warrant was executed on March 29, 1982, four months after the consent search of petitioner's home. Petitioner filed a motion (R-64-92) and

several amended motions (R-138-148, R-149-153, R-154-208, R-1543-1549) to suppress evidence seized pursuant to invalid search warrants. See Appendix E(1) for pertinent quotation. A suppression hearing was heard on December 20th and 21st, 1982. In a letter to defense counsel, dated January 12, 1983, the trial judge denied all of petitioner's suppression motions. This letter is included in the addendum to the record below.

After petitioner's conviction and the denial of his motion for a new trial, petitioner appealed to the Georgia Supreme Court. Enumeration of Error Number 8 of his brief contended that the trial court had erred in denying petitioner's motion and amended motions to suppress. See Appendix E(1) for verbatim quotations.

In an opinion dated March 15, 1984

affirming petitioner's conviction, the Georgia Supreme Court said that "the affidavits are perhaps not perfect. But we find no material inaccuracies or misrepresentations. . . Nor do we find any information insufficient to support the issuance of the warrants." See the opinion reproduced as Appendix A at 67. See also Appendix E(1) for pertinent quotations. The opinion also stated that there was no merit to petitioner's contention that the magistrate was not neutral and detached. See Appendix A at 70-71. See also Appendix E(1) for pertinent quotations.

Petitioner also filed a pre-trial motion to exclude from his trial the testimony of the alleged extrinsic offense victim concerning rape. Petitioner contended that the doctrine of collateral estoppel prevented the state from

compelling petitioner to relitigate the rape charge once he had been acquitted of it. Petitioner filed a pre-trial Amendment to Motion in Limine and Motion for Severance (R-604). See Appendix E(2) for pertinent quotations. A pre-trial hearing on this motion was conducted on November 19, 1982. The trial court stated: "The motion in limine as amended, then, would be also denied." V-9-62. Petitioner renewed his objection at trial. V-12-617-619, denied at V-12-621. See Appendix E(2) for pertinent quotations.

Petitioner raised the issue again in his appeal to the Georgia Supreme Court. Enumeration of Error Number 11 complained that the trial court erred by denying petitioner's Amendment to Motion in Limine and Motion for Severance. Petitioner stated that the doctrine of collateral estoppel required the exclusion of the

alleged extrinsic victim's testimony concerning rape. See Appendix E(2) for verbatim quotations. The court acknowledged that Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972) and its progeny had established a per se rule for exclusion, but noted that "[t]hese Fifth Circuit cases, of course, are not binding precedent for this court." See Appendix A at 34. See also Appendix E(2) for pertinent quotations.

When the Georgia Supreme Court announced its denial of petitioner's motion for a rehearing (March 29, 1984), the Court substituted two new pages dealing with the collateral estoppel issue. See Appendix B. The court again rejected the Fifth/Eleventh Circuit Wingate rule. The court stated that because identity was not an issue in the 1976 case, the state was not collaterally

estoppeo from admitting the extrinsic offense evidence. The court concluded that petitioner's contention "that the 1976 crime was inadmissible, because of the acquittal, is meritless." See Appendix B at 116. See also Appendix E(2) for pertinent quotations.

At trial, petitioner moved for a directed verdict at the close of the state's evidence (V-12-721-733) on the grounds that the evidence was insufficient for conviction. The motion was denied (V-12-733). The motion was renewed and denied at the close of all the evidence. V-13-1010.

On appeal to the Georgia Supreme Court petitioner argued at length that the evidence was insufficient for conviction. The evidence was wholly circumstantial and failed to exclude every other reasonable hypothesis save that of petitioner's

guilt. Petitioner's enumeration of error number 1, therefore, contended that the trial court erred in denying petitioner's motions for a directed verdict. See enumeration of error number 1 in Appendix E(3). The trial court found the evidence meager, and stated in the record that the evidence did not exclude theories inconsistent with innocence. See Appendix E(3).

The Georgia Supreme Court found the conviction "to be amply supported by the evidence" and found petitioner's arguments to be meritless. See Appendix A at 58. See also Appendix E(3) for pertinent quotations from opinion.

The Georgia Supreme Court rendered its opinion on March 15, 1984 affirming petitioner's conviction. Petitioner's motion for a rehearing was denied on March 29, 1984.

ARGUMENT

(1) PETITIONER'S ACQUITTAL OF THE EXTRINSIC OFFENSE OF RAPE TRIGGERED THE APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL EMBODIED IN THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Petitioner was acquitted of rape in 1976. During his trial on the instant case the state, over petitioner's objection, was allowed to introduce the testimony of the alleged victim of the unrelated 1976 offense. The extrinsic offense was used to support a jury finding of an aggravating circumstance authorizing the death penalty, i.e., that murder occurred during the commission of a rape. The extrinsic offense was also used to support a conviction in the instant case of rape. The extrinsic crime victim testified at length about her recollection

of the earlier incident including her assertion that petitioner raped her. V-12-652. The Georgia Supreme Court affirmed the trial court's admission of this highly prejudicial evidence. Felker v. State, 252 Ga. -,314 SE2d 621 (1984).

In Ashe v. Swenson, 397 U.S. 436 (1972), this Court held that the doctrine of collateral estoppel is a part of the Fifth Amendment's guarantee against double jeopardy.

The Fifth Circuit, in Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972), held that the doctrine of collateral estoppel prohibits the admission in a subsequent trial of evidence of an extrinsic crime of which defendant had been acquitted. 464 F.2d at 214-15. The court reasoned that,

> It is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer

> proof that a defendant committed a specific crime which a jury of that sovereign has concluded that he did not commit. Otherwise a person could never remove himself from the blight and suspicious aura which surround an accusation that he is guilty of a specific crime.

Wingate, 464 F.2d at 215.

The Second Circuit adopted the Wingate rule in United States v. Mespoulede, 597 F.2d 329 (2d Cir. 1979). The Third Circuit followed suit in United States v. Keller, 624 F.2d 1154 (3d Cir. 1980). Wingate is binding precedent for the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981). The Sixth Circuit has adopted a modified version of Wingate. See United States v. Johnson, 697 F.2d 735 (6th Cir. 1983). The remaining circuits have either rejected Wingate (see, e.g., United States v. Castro-Castro, 464 F.2d 336 (9th Cir. 1972), cert. denied, 410 U. S. 916 (1973))

or have remained silent. Thus, there is a split in the circuits on this important issue. There is also a split in the state courts of the Eleventh Circuit. Florida courts of last resort have adopted the Wingate rule while Georgia has rejected Wingate. See State v. Perkins, 349 So.2d 161 (Fla. 1977). Felker v. State 252 Ga _____ (1984). The Alabama Court of Appeals, the highest Alabama court to rule on the issue has rejected Wingate. Smith v. State, 409 So.2d 455 (1981). There is therefore a conflict among the circuits, and a conflict among the courts of last resort within the Eleventh Circuit as to the application of a grave constitutional safeguard. There is also a conflict between the circuit and the state courts of last resort as to the application of this federal question.

Unquestionably, the admission of

extrinsic offense evidence is very helpful to the prosecution. In the instant case, the state used the evidence of the prior alleged rape in order to identify petitioner as the rapist and murderer of Joy Ludlam. The alleged victim's testimony comprised fifty four pages of the transcript. V-12-626-682. The importance attached by the state to this testimony is evidenced by the district attorney's devoting fully one third of his closing argument to the alleged extrinsic offense. See V-13-1076-1100. The obvious purpose for using the prior offense was to unduly inflame the jury, and attack petitioner's character.

Appellant was forced to relitigate the charge of rape even though a jury had already acquitted him of that charge. The unfairness of a rule which permits admission of a prior acquitted offense

affects numerous criminal defendants who must defend not only against the offense of which they are currently charged, but also against extrinsic offenses of which a jury had acquitted them.

Appellant asks the Court to grant certiorari in order to resolve the split in the circuits and state on this issue and to correct the error of the Georgia Supreme Court in failing to apply the Wingate rule.

(2) THE REQUIREMENT OF A NEUTRAL AND DETACHED MAGISTRATE MANDATED BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS OFFENDED BY A MAGISTRATE WHOSE FINANCIAL POSITION IS DEPENDENT UPON THE NUMBER OF WARRANTS HE ISSUES AND WHOSE ACTIVITIES ARE INTRICATELY ENTANGLED WITH THOSE OF LAW ENFORCEMENT OFFICIALS.

The magistrate in the instant case was

neither neutral nor detached. In Connally v. Georgia, 429 U.S. 245 (1977), this Court held that a magistrate cannot be a neutral and detached magistrate if his financial position is enhanced by positive action (issuing a warrant) and not enhanced by negative action (denying a warrant). The magistrate in the instant case billed the county only for the warrants he issued. V-6-187-188. During the six month period encompassing petitioner's suppression hearing, the magistrate issued over 600 warrants. V-6-191-192. The scope of his practice, therefore, was large, yet he testified that during his eleven year tenure as justice of the peace he had refused to issue only two or three warrants requested by police officers. V-6-189.

When the above facts are examined together, the conclusion becomes

inescapable that the magistrate believed that his job was to issue warrants. One expects to be paid for the work one does. The converse is also true. Since the magistrate's policy was to ask for payment only for warrants he issued, he obviously did not feel that his job included the denial of warrants. The magistrate's financial stability depended upon his issuance of a steady stream of warrants. He cannot be considered neutral. The Georgia Supreme Court erred, therefore, in holding that the magistrate's policy did not offend Connally.

The following facts demonstrate that rather than being detached, the activities of this magistrate were excessively entangled with those of law enforcement officials:

(1) The magistrate "customarily" went to the police station to issue warrants

instead of requiring police officers to come to his office. V-6-175-176. He sat in the police visitor's chair to issue the warrants in question, while the requesting officer sat at the police desk. V-6-178.

(2) During a three hour interim period between the issuance of search warrants, the magistrate stayed at the police station and listened to police colloquy about the case. V-6-86.

(3) After issuing a warrant for the search of petitioner's car, the magistrate watched the officers search the car for four to five minutes. V-6-183.

(4) Pursuant to a policy established by the district attorney, the magistrate refused to give copies of the search warrants and supporting affidavits to defense counsel. V-6-312-314.

(5) The magistrate issued a total of eleven warrants, five of which were for

the search of petitioner's home. V-6-365-395. He continued to issue warrants for the home for basically the same items, even though officers failed to find the items specified in the previous warrants and even though the new warrants were unsupported by new facts.

The above facts demonstrate conclusively that this magistrate's activities lacked the type of severance and disengagement from law enforcement activities mandated by the Fourth Amendment. The magistrate "was not acting as a judicial officer but as an adjunct law-enforcement officer". Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 327 (1979).

The importance of this issue transcends its effect on petitioner. Because this Court in Illinois v. Gates, 103 S.Ct. 2317 (1983) indicated that great

deference would be accorded to a magistrate's determination of probable cause, the need for a truly neutral and detached magistrate is more essential than ever. Petitioner, therefore, asks the Supreme Court to grant certiorari on the basis that the Georgia Supreme Court, in direct conflict with the Connally decision, erred by ruling that the magistrate was neutral and detached.

(3) THE WARRANTS ISSUED WERE UNSUPPORTED BY PROBABLE CAUSE IN VIOLATION OF THE FOURTH AMENDMENT.

(4) IMPERMISSIBLE GENERAL SEARCHES WERE EVIDENCED BY THE OFFICERS' SEIZURE OF ITEMS NOT DESCRIBED IN THE WARRANT AND NOT OBVIOUSLY CONNECTED TO THE CRIME.

In Brinegar v. United States, 338 U.S. 160 (1949), this Court noted that probable

cause sufficient to support a warrant exists when the facts and circumstances in a given situation are sufficient to warrant a man of reasonable caution to believe that seizable objects are located at the place to be searched.

In the instant case, petitioner gave his consent to a search of his home on the night the victim was reported missing. V-6-151-152. Neither the victim nor any evidence of a crime was found. After the victim's body was discovered two weeks later, a search warrant was issued for petitioner's home. The items to be seized were hairs, fibers, human blood, a gold necklace with a Mickey Mouse figure, a floating heart bracelet and an adhesive substance. There were no facts in the affidavit or warrant showing that the items sought were connected with the crime. Furthermore, neither the affidavit

nor the warrant contained reasons why the affiant believed that the items named would be found in petitioner's home. V-6-370-375.

It is also evident that the items were not particularly described. Unidentified body and head hairs and fibers would undoubtedly be found in petitioner's home just as they would be found in anyone's home. The sources of the sought-after hairs and fibers were never identified. Furthermore even if the victim had been designated as the source, the nexus between the hairs and the crime would be attentuated because petitioner freely admitted that the victim had been in his home on two separate occasions.

The affiant stated that he believed that the victim was alive for ten days after she was reported missing. Petitioner was under surveillance during

that time. When these facts are coupled with the facts that the consent search of petitioner's home revealed nothing, the conclusion becomes inescapable that the facts were insufficient to lead a man of reasonable caution to believe that the items named would be found at petitioner's home. The warrants were not supported by probable cause.

In addition, because of the lack of particularity with regard to the hairs, fibers, and blood, the warrant authorized a general search, the very thing the Fourth Amendment warrant requirement was designed to prevent. Marron v. United States, 275 U.S. 192 (1927). The general exploratory nature of the search is evidenced by the fact that the officers seized, among other things not named in the warrant, an envelope containing lewd drawings. The drawings were not visible

while in the envelope. The plain view doctrine prohibits the officers from opening the envelope unless the envelope itself was obviously contraband. See Coolidge v. New Hampshire, 403 U.S. 443 (1971). The drawings were introduced into evidence over defense counsel's objection. R-64-92.

It must also be noted that none of the three people involved with the search warrant could remember anything relevant that was told to the magistrate that was not contained in the four corners of the affidavit. V-6-80-81, 95, 97-98, 143, 194-195. The search for probable cause, therefore, must be limited to the facts noted in the affidavit.

Finally, issuance of the warrants was based on stale information. The warrant which produced allegedly culpable hairs was issued three months after petitioner

was arrested. Four previous warrants had been issued for the search and seizure of hairs, three of which were executed. No hairs seized during these initial searches were introduced at trial. Nonetheless, a fifth warrant, based on the same facts as the earlier ones, was issued for a search of petitioner's home. The affidavit failed to provide facts showing who had been in petitioner's home during the three months at issue. It also failed to identify the source for the sought-after hairs and fibers. Finally, it failed to reveal why those items should then be found in petitioner's home. The required nexus between the items and the crime remained lacking.

Petitioner asks the Supreme Court to grant certiorari on the basis that the magistrate lacked a ""'substantal basis for ... conclud[ing]' that probable cause

existed."" Illinois v. Gates, 103 S.Ct. 2317, 2322 (1983) (quoting Jones v. U. S., 362 U. S. 257, 271 (1960)). The need for review is particularly pressing because the Georgia Supreme Court failed to address either the staleness issue or petitioner's contention that the warrants authorized a general search.

(5) THE SEARCH WARRANTS WERE UNLAWFULLY OBTAINED BY WITHHOLDING FROM THE MAGISTRATE IMPORTANT FACTS GERMANE TO THE EXISTENCE OR NON-EXISTENCE OF PROBABLE CAUSE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS.

The affiant for the search warrants claimed that petitioner was the last person to see the victim alive. The affiant withheld from the magistrate the important fact that he knew of two respected members of the community, one of

whom knew the victim personally, who had reported seeing the victim alive and associated with other people, not petitioner, days after she was reported missing. V-6-6; V-12-750. Instead of informing the magistrate of this, the affidavits stated that the victim was last seen with petitioner.

Affiant also mentioned nothing to the magistrate concerning the consent search made of petitioner's home on the evening the victim was reported missing. Nothing suspicious was found in that search. V-10-218, 229. Finally, nothing was said about the same officers looking in the window of petitioner's shop on the same date. V-10-232-233.

The withholding of these pieces of information was crucial to the question of probable cause. A cautious and prudent magistrate looking at these facts would

have wondered why he should issue a warrant for a search of petitioner's home when a non-productive consent search had already occurred and when at least two people had seen the victim alive after that search.

The requirement that evidence of probable cause be submitted is meaningless if the police can create the facts to submit to the magistrate. The police should be required to give generally complete and accurate facts to the magistrate to show the existence or not of probable cause.

(6) PETITIONER'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW WAS VIOLATED BY THE IMPOSITION OF THE DEATH PENALTY WHEN THE EVIDENCE WAS CLEARLY INSUFFICIENT AS A MATTER OF LAW.

The due process clause of the

Fourteenth Amendment to the United States Constitution guarantees protection against state action that is arbitrary or fundamentally unfair. The imposition of the death penalty under the facts of this case would certainly be a violation of due process under that standard.

The evidence against petitioner was wholly circumstantial and consisted of many weak or missing links. The state's entire theory of the case rested on establishing that death occurred the night before the victim was reported missing. Yet the evidence on that point was meager indeed. Even the state's medical examiner initially believed that the victim died only three to five days before she was found. The evidence that she was raped and sodomized was virtually non-existent. Although several hairs consistent with the victim were found in petitioner's home,

their presence was totally consistent with innocent behavior. Petitioner freely admitted that the victim had been in his home on two occasions the day before she was reported missing. Hair transference was to be expected. Transference also explains the presence of fibers from a blanket in petitioner's home being found on the victim's coat.

The evidence, therefore, was clearly insufficient to identify petitioner as the killer and his home as the crime scene. Likewise, it was insufficient to demonstrate when the victim died and whether she had been raped or sodomized. A rational jury could not find evidence of every element of murder, rape, aggravated sodomy, and false imprisonment beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979).

Petitioner was convicted because the

state was allowed to introduce the testimony of a prior victim. Her testimony was lengthy and highly emotional. The district attorney spent a great deal of time with a mannequin on the floor demonstrating in intricate detail how the extrinsic offense victim had been tied up. She was allowed to testify that petitioner had raped her even though petitioner had been acquitted of that crime.

It is important to note that petitioner's version of the events in issue remained constant throughout. His story is certainly consistent with the known facts. Nothing that was subsequently seized renders his story implausible.

Because the evidence was clearly insufficient for conviction and imposition of the death penalty, petitioner asks the

Supreme Court to grant certiorari in order to determine whether petitioner's due process rights have been violated.

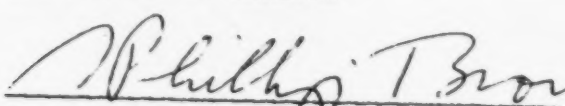
(7) PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS HAVE BEEN VIOLATED UNDER THE CIRCUMSTANCES OF THIS CASE.

Dr. David Boldus' study, presented to the court in McCleskey v. Zant, 580 F.Supp. 338 (N.D.Ga. 1984) conclusively demonstrates that the death penalty cannot be imposed in an even-handed manner. The Boldus study concludes that, statistically, juries are much more inclined to vote for the death penalty when the victim is white than when the victim is nonwhite.

In the instant case, the victim was a young, attractive, white woman. Despite the paucity of evidence as to how, where, when, and at whose hands she met her

death, the jury sentenced petitioner to death. The assertion that this result constitutes cruel and unusual punishment and violates petitioner's due process rights is buttressed by the fact that the chief evidence against petitioner was the testimony of the alleged extrinsic offense victim. The imposition of a death sentence on petitioner mainly on the testimony of a woman who claimed to have been raped by petitioner in 1976 is certainly cruel and unusual given the fact that another jury acquitted petitioner of that offense.

S. PHILLIP BROWN



Counsel of Record

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APPENDIX A

IN THE SUPREME COURT OF GEORGIA

Decided: March 15, 1984

40350. FELKER v. THE STATE.

BELL, Justice

Late in the morning of December 8, 1981, the body of 19-year-old Evelyn Joy Ludlam was found floating in Scuffle Creek, in Twiggs County, near a bridge on the "Cochran short route." She had been missing for two weeks and the last person known to have seen her alive was the appellant, Ellis Wayne Felker.

Felker was charged in Houston County with murder, robbery, rape, aggravated sodomy, and false imprisonment. At trial, a verdict of not guilty was directed on the robbery count, and a jury convicted Felker on the remaining counts. Felker was sentenced to death for the murder. We

affirm.

The victim, Joy Ludlam, was a student at Macon Junior College and worked as a cocktail waitress at the Holiday Inn in Warner Robins. Her parents were residents of Macon but, about 10 months prior to her death, Joy had moved to Warner Robins to live with an older woman whom Joy had met through church. Not being entirely satisfied with her job at the Holiday Inn (her religious beliefs did not allow her to work Friday nights or Saturdays), Joy had begun to seek other employment prior to her death.

On Monday evening, November 23, 1981, between 11:00 and 11:30 p.m., Wayne Felker visited the lounge where Joy worked. He was wearing a T-shirt advertising "The Leather Shoppe," a business that he owned in Warner Robins.

Felker had been convicted in 1976 of

aggravated sodomy. In April of 1981, shortly after his release from prison, Felker opened his leather shop. A neighboring businessman testified that from April until June, Felker's business gradually increased. Felker began to lose interest in the business, however, and, from September onward, was seldom there. His neighbor collected his mail for him. Felker attributed his disinterest to his romance with Patricia Woods, whom he met not long after he opened his business. Felker testified that after he and Ms. Woods began living together, he "more or less let the business fail." He admitted that the shop's checking account was overdrawn the night he met Joy Ludlam and that he had been making ends meet by borrowing money from his parents (who owned the house in which he lived), and by selling some or his furniture.

Nonetheless, when Joy noticed Felker's T-shirt advertising his business, a conversation ensued which culminated in an offer of employment, pursuant to which they were to meet the next day.

Pat Woods had left Felker the previous Saturday after he had blackened both her eyes, so he was alone Tuesday morning when Joy arrived. A neighbor, who had been asked by Felker's mother to keep track of the cars visiting Felker's house, noticed Joy's arrival at approximately 9:00 a.m. and wrote down the tag number of her car. The neighbor testified that the car was gone by 11:00 a.m.

Felker testified that he was at home awaiting a hoped-for call from Pat Woods. He testified that, when Joy arrived and wanted to see the shop, he told her that he was expecting a call and couldn't go then.

Joy returned to her residence at approximately 2:00 p.m. A visitor to the residence, Ms. Akins, testified that, some time after 2:30 p.m., Joy made a telephone call during which she mentioned that she "would like to see the shop." According to Ms. Akins, Joy left around 5:00 p.m. wearing a long, plaid coat.

At approximately 6:30 p.m., Joy called the manager of the Holiday Inn lounge and told him that the mother of the lady with whom she lived was in the hospital and that Joy wanted to stay with her. The manager gave her the night off.

When Guy Starling, office manager of the Trust Company Bank in Warner Robins, left work Tuesday evening, between 6:30 and 7:30 p.m., he noticed an automobile parked in the bank's parking lot that did not belong to any of the bank's employees. He wrote down the tag number. The car was

still there the next day.

Irma Anthony, with whom Joy lived, spent Tuesday night at the hospital with her mother. She returned home Wednesday morning to discover that Joy was not there. As evening approached and Joy still had not returned, she went to the police, taking with her a photograph of Joy and a napkin on which had been written Feker's telephone number and the address of his leather shop. Two officers visited Felker Wednesday evening at approximately 5:30 p.m. Felker told them that he had met Joy the previous evening pursuant to his offer of employment. He told them that she had left his shop at around 6:00 p.m. because that was when the shop closed. He said that they had traveled in separate cars and that, although he had opened and closed the door for her, he never got into her car, nor had she got into his. He

stated that when he last saw her, she was wearing a plaid coat and a red dress.

Joy's mother, having been informed of her daughter's disappearance, drove to Warner Robins on Thursday to search for her. Mrs. Ludlam found Joy's car parked in the parking lot of the Trust Company Bank at about 2:30 p.m. The car was locked. She notified the police, who subsequently searched the car and found, on the front seat, a notebook opened to a page on which was written, in Joy's handwriting: "I'm going to Atlanta to eat dinner with Wayne and some of his friends. They are GS-11's on base. Joy."

On December 1, with Joy still unlocated, investigators questioned Pat Woods, who had resumed her cohabitation with Felker. Soon afterwards, Felker collected some of his pornographic magazines and his bondage cuffs (3-inch

wide leather straps with "watch-band" buckles) and threw them in a garbage dumpster.

On Tuesday, December 8, 1981, two weeks after she disappeared, Joy's body was discovered in Scuffle Creek by a mechanic who was searching the right-of-way along the Cochran short route, looking for discarded bottles and cans. She was clothed in the same plaid coat and red dress that she had been wearing when last seen alive.

An autopsy was conducted the following morning. Warren Tillman, a medical examiner with the state crime lab, observed that pantyhose and underwear were still on the body that the crotch of each had been ripped out. On her face, around her eyes and mouth, were lines of a whitisn material which, on examination, appeared to be an adhesive substance.

Tillman noted hemorrhaging inside the eyelids indicative of asphyxiation, and contusions at the junction of the lips indicative of some sort of force against her mouth. On her neck was a long, narrow area of bruising. On her breasts, he observed ecchymotic hemorrhage consistent with having been induced by suction. There were bruise marks on her left shoulder and on her right thigh. There were marks on her left wrist and on her ankles consistent with their having been bound. Tillman observed areas of contusion around the vagina and anus, which was distended, indicating traumatic entry of these orifices. On internal examination, Tillman noticed an area of hemorrhage near the second, left rib, that had no associated surface bruising, which was consistent with force having been applied by an object such as a fist or a

foot. He observed a number of areas of subgaleal hemorrhage on the inside of the scalp. However, there was no evidence of brain hemorrhage. Examination of the lungs indicated that Joy had been dead when she was placed in the water. Tillman concluded that the cause of death was asphyxiation from strangulation.

Establishing a time of death proved difficult. Tillman's original estimate, based on the state of decomposition of the body, was that Joy had been dead 3 to 5 days, or possibly longer--the immersion of the body in the water complicated the determination. After receiving information regarding air temperature, and reviewing other case histories involving bodies immersed in water, Tillman concluded that Joy had been dead at least three to five days, and that she could have been dead for two weeks.

On February 4, 1982, Joy's body was exhumed. Sections of tissue were taken from bruised areas on her body. Dr. James Whitaker, medical examiner for Houston County, microscopically examined these tissue samples to ascertain the extent of "margination." Dr. Whitaker concluded that the bruises had been inflicted within 4 to 6 hours prior to death.

On February 16, 1982, a hunter found Joy's purse on the north side of Highway 96, near the Houston-Twiggs county line, 3 to 4 miles west of the intersection of Highway 96 and the Cochran short route. Besides her driver's license and college I.D., the purse contained a "Mickey Mouse" pendant which Joy habitually wore on a chain necklace. The necklace itself was never found.

Between December 8, 1981, and March 29, 1982, Felker's house and car were

searched several times. Hairs and fibers were collected and microscopically compared with hairs and fibers found on the body. Fibers found on the victim's coat were consistent with fibers present in a yellow and orange blanket first observed in Felker's home and later retrieved by police from his parents. Fibers similar to those of the victim's coat material were found in the hatchback area of Felker's automobile. Hairs were found on the victim's clothes, including her under clothes, and on her body, that were similar to Felker's head and beard hair. Hairs adhering to two handkerchiefs in the victim's pocketbook were similar to Felker's head hair. In addition, several hairs discovered in the bedroom of Felker's home were similar to the victim's head and pubic hair.

Felker had been involved in an earlier incident involving bondage and forcible sex. This incident was described at trial by the victim. On October 3, 1976, Jane W., a cocktail waitress, stopped by a Sambo's restaurant for coffee after she got off work. Then she drove home, alone. As she pulled into her driveway, a car stopped in front of her house and the driver called to her. The driver (she later discovered) was Wayne Felker, who told her that he was lost, and that he was looking for a party on Navarro Drive. Ms. W., who had recently moved to Warner Robins, had heard of Navarro Drive and knew that it was nearby. Felker, a lifelong resident of Warner Robins, told Ms. W. that he had no idea how to get to Navarro Drive, that he was in a friend's car, and that he was supposed to meet the friend at the party. Ms. W. agreed to get

him to the general area. She got in her car and proceeded towards Navarro Drive, followed by Felker in his car. She was unable to find the right street. Eventually, they drove by Sears, and Felker passed her car and turned into the Sears parking lot. She pulled in behind him. He got out, approached her car, and told her that he was too drunk to drive anymore and that he would get in trouble if he damaged his friend's car. He asked Ms. W. if she could drive him to his friend's wife's house, which he knew to be just down the road. Ms. W. testified that, "he was so nice . . ., he acted so lost . . ., [he] sounded so convincing . . . [that] I unlocked the door [and] he got in the car."

Felker directed her to a trailer on Porkie Drive. She waited in the car while he went inside. A few minutes later, he

returned. The friend's wife was getting dressed and would take him to the party after she woke the baby up. He asked Ms. W. if she could wait a few more minutes, so that she could take them back to the friend's car. She answered that she could, but that she had to use the bathroom. Felker invited her inside. She accepted his invitation and, leaving her pocketbook in the car, entered the house and began walking down the hall, followed by Felker. About halfway down the hall, she "realized that there didn't seem to be anybody else in there . . . there was no light; there was no lady; there was no child; . . . there didn't even seem to be . . . another bedroom . . ." She turned around. Felker grabbed her around the neck and started choking her.

He carried her to the bedroom and threw her, face down, onto the bed. As he

held her head down with one hand, he pulled one of her arms behind her back. He tied a rope around it, pulled the other hand back, and then tied her hands together.

Next, he laid her, face down, on the floor and tied her feet together. Felker placed some cotton over her eyes and taped her mouth and eyes with duct tape. Then he tied her to the bed, and left.

Ms. W. heard him drive off. Ten or 15 minutes later, she heard him return, driving a different car.

He proceeded to the bedroom, where he untied her feet and laid her on the bed. He took her necklace off. He tied her hands to the corners of the bed and undressed her from the waist down, ripping her underwear. He cut and then ripped off her shirt and bra, and tied her legs to the other two corners of the bed.

Then he asked her, in effect, whether she had ever been anally sodomized. When she didn't answer (she was still gagged), he punched her on her right thigh with his fist, pounded her on her chest, and said, "I'm talking to you."

Felker then attempted to anally sodomize Ms. W. She testified that she struggled so much that Felker was unsuccessful in this attempt, but that after Felker violently struggled with her, and grabbed her and punched her with his fists, he became sufficiently aroused that he was able to rape her.

Then, after Felker obtained a vibrator or some similar object and "rammed" it inside Ms. W., he removed the duct tape from her mouth and orally sodomized her.

Afterwards, Ms. W. talked to Felker and finally convinced him to untie her hands and feet so that she could use the

bathroom. Untied, but still blindfolded, she was guided to the bathroom and then back to the bedroom. Felker lay down beside her and fell asleep. Ms. W. left and called the police. As she left, she picked up her pocketbook, which was in the bathroom. She later discovered, in the bottom of her purse, the pendant from her necklace. She never recovered the necklace itself.

Evidence was offered by Felker in support of his contentions that the 1976 incident involved consensual sex, that he last saw Joy Ludlam at approximately 6:00 p.m. on November 24, 1981, and that she had not been dead for two weeks when her body was discovered.

Regarding the 1976 incident, Felker testified that he had stopped in front of Ms. W's home to ask directions to a party on Navarro Drive, even though he was a

lifelong resident of Warner Robins. (In fact, during the sentencing phase of the trial, it was revealed that his aunt lived on Navarro Drive in 1976). Felker claimed that he invited Ms. W. to the party and that she accepted. He testified that they stopped at the Sears parking lot when they couldn't find the party, and decided to go to his trailer. He parked his car for fear that, because he had been drinking, he was going to be stopped by the police if he continued driving. They proceeded to his trailer in her car. Upon their arrival, she went to the bathroom. Felker (presumably, no longer worried about being stopped for DUI) decided to drive to the store to get cigarettes. After discovering that her car was low on gas and remembering that there were cigarettes in his car, he drove to Sears and switched cars. When he returned, Ms. W. was

looking at his bondage magazines and expressed an interest in having sex while being tied up. Everything that followed, Felker said, was with her consent.

On cross-examination, Felker admitted that he might possibly have inflicted the circular bruise on her right thigh and other bruises on her body, and that he "might have gotten too rough." He admitted that he had been at Sambo's earlier, but claimed that he had not followed Ms. W. and that their meeting had been coincidental. He admitted removing her necklace, but didn't know why he had done so, nor could he explain how the pendant wound up in her purse, absent its necklace. He explained that he had taped her mouth because she "was giggling." He didn't recall why he had taped her eyes. He didn't know why he tied her up before removing her clothes, nor did he know what

she was going to wear home after her clothes had been cut.

Regarding the disappearance of Joy Ludlam, Felker testified that when she called Tuesday morning, he was asleep in a recliner in the living room, covered up with his orange and yellow blanket. After her morning visit, he went to his shop to retrieve a compressor, some spray guns, paint and so forth, that he intended to use to refinish some furniture. He loaded these items into the hatchback area of his car and returned home.

When Joy stopped by his house later that day, she took off her coat and laid it on the recliner. She made a telephone call while he changed clothes. When they exited the house, Felker realized that he had not yet unloaded his car. Although Joy "seemed to be in a hurry," Felker nonetheless took the time to unload his

car before they lert. As he was doing so, she observed a number of leather catalogs in the back of his car. Felker told her to go ahead and take one. She still had her coat on her arm as she leaned into the hatchback area of the car to reach "all the way to the back part of the back seat." Then she went to her car and sat in the driver's seat thumbing through her catalog. (No such catalog was discovered in the search of her car two days later.)

According to Felker, he last saw Joy Ludlam as she left his leather shop that evening. On his way home he stopped by Sears. (Sears is across the street from the Trust Company Bank where Joy's car was parked when Guy Starling left work between 6:30 and 7:00 p.m.)

Felker testified that he left his house twice that night. The first time, he went to a convenience store to purchase

beer and cigarettes. Sometime after midnight, he left to "drive around looking for Pat [Woods]." Felker admitted that Pat had called him around 10:30 p.m. and that they had agreed to meet the next morning. He knew that she had no car. When asked by the district attorney how he expected to find her, Felker answered that he was "[h]oping she'd be in a yard somewnere." Felker denied that the real purpose of the trip was to dispose of Joy Ludlam's body. He admitted that he was unable to find Pat Woods standing out in someone's yard in the wee hours of the morning, and that he returned home alone.

Regarding the length of time that Joy Ludlam had been dead when her body was discovered, Felker retained the services of a geologist and Dr. Joseph Burton, the chief medical examiner for Fulton and DeKalb counties.

The geologist measured air and water temperatures at Scuffle Creek from November 28th through December 2, 1982. Air temperatures varied from lows of around 60 deg. (Fahrenheit) to highs of about 80 deg. Water temperature remained fairly constant at about 60 deg. On December 11 and again on December 19, the water temperature was again measured and a low water temperature of 43 deg. was recorded.

Air temperatures for 1981 were available though the National Weather Service, which indicated that the comparable period in 1981 was colder. Between November 24, 1981, and December 8, 1981, low temperatures ranged from 31 deg to 50 deg. (seven days having lows in the 30's and six days having lows in the 40's) and high temperatures ranged from 55 deg. to 75 deg. (four days having highs in the

50's and seven days having highs in the 60's).

Dr. Burton--based upon his examination of the autopsy photographs; the report of Warren Tillman and the latter's description of the extent of decomposition; an assumption (having some support in the evidence) that there was stiffness in the body when it was removed from the water; an assumption that the water temperature remained relatively constant in the mid-50's; the lack of skin slippage[1]; the lack of bloating; and the lack of signs that animal life had fed upon the body--testified that, although his estimate was "fraught with error" because of the number of variables that had to be considered, in his opinion,

1 All the experts agreed that hands would suffer immersion wrinkling (Joy Ludlam's did)) and that eventually the skin would separate from the hand. This separation, called slippage, was not present in this case.

death occurred between three and five days before the body was discovered.

Dr. Whitaker, the medical examiner for Houston County, testified for the state in rebuttal. His early experience was in Baltimore, Maryland, and, perhaps due to the proximity of Chesapeake Bay, he had observed over "200 drowning or immersion-type cases." Dr. Whitaker testified that--considering the air temperatures in the relevant time period; the fact that most missing and murdered persons die soon after they disappear; the fact that when Joy Ludlam was found, she was wearing the same clothes as when she was last seen alive; and the extent of decomposition--in his opinion, death occurred two weeks prior to the discovery of the body.

1. We address, first, appellant's enumerations of error regarding his prior

conduct.

(a) In his tenth enumeration of error, apellant contends that evidence of the commission of rape and sodomy in 1976 was irrelevant and impermissibly placed his character in issue.

A defendant's guilt "may not be proved by showing the commission of other crimes to prove that the accused has a criminal nature." Williams v. State, 251 Ga. 749, 784 (4) (SE2d) (1983). However, evidence of other criminal acts of the defendant may be admitted if it "'is substantially relevant for some purpose other than to show a probability that (the defendant) committed the crime on trial because he is a man of criminal character . . . .'" Walraven v. State, 250 Ga. 401, 407 (297 SE2d 278) (1982) (quoting McCormick on Evidence, § 190 at 449, 2d Ed., 1972).

Similarity between the charged crime and the extrinsic crime is an important factor pertinent to a determination of the admissibility of the extrinsic crime. However, it is not the only factor, nor is it necessarily the controlling factor. "The ultimate issue in determining the admissibility of evidence of other crimes is not mere similarity but relevance to the issues in the trial of the case." Williams v. State, supra, 251 Ga. at 784. Depending upon the purpose for which the extrinsic offense is offered, "the state may be required to prove a high degree of similarity between the relevant characteristics of the extrinsic offenses and the charged crimes, or it may only have the burden of showing a logical connection between crimes which are essentially dissimilar. [cits.]" Williams v. State, supra, 251 Ga. 811

(Smith, J., dissenting).2

Since the admissibility of an extrinsic offense depends, in the first instance, upon its relevance, the factual and legal issues involved in the case are controlling. The degree of similarity sufficient to support admissibility in one case might be insufficient in another.

Thus, Williams v. State, supra, on which the state relies, is inapposite. In Williams, we found that the "sheer number" of homicides committed for no apparent motive, having sufficient other characteristics in common to demonstrate a "pattern of killings," all of which were logically connected to Williams by hair and fibers, allowed an inference of guilt that derived from the improbability that

2 "To take a dramatic example, defendants' knowledge that they did not have permission to take a car can be proven by evidence that they murdered the owner." Wright and Graham, Federal Practice and Procedure, § 5245, p. 506 (1978).

so many connections to so many of the murder victims could be innocent.3 See United States v. Woods, 484 F2d 127 (4th Cir. 1973).

In the instant case, on the other hand, we find that the extrinsic offense proved by the state were "so nearly identical in method as to earmark them as the handiwork of the accused." McCormick on Evidence, supra at 449. The evidence produced by the state showed a distinctive modus operandi and was thus relevant to prove identity, which was clearly a disputed issue in the case.

The similarities are numerous and

3 "Rather than search the digests for a category into which the proposed use can be crammed, courts should examine the complete chain of inferences necessary to make the evidence of other crimes relevant and admit or exclude the evidence on the basis of whether it is or is not offered to prove some conduct of the accused and whether it does or does not require an inference as to his character." Wright and Graham, supra, § 5240, pp. 477-478.

distinctive: Each victim was a young, white female employed as a cocktail waitress. Each was lured into appellant's company by deceitful means. (Ms. W. was asked for help in finding a nonexistent party by a man who claimed to be from out of town, but who was, in fact, a lifelong resident of Warner Robins. Ms. Ludlam was offered employment in a defunct business.) Both women were separated from their automobiles, which were subsequently found in parking lots which are across the street from each other. Both women were bound at their ankles and wrists. Ms. W.'s mouth and eyes were covered with duct tape. When Ms. Ludlam's body was recovered, she had lines of adhesive on her face which were visible in the photographs admitted in evidence; and which were obviously the outline left by the removal of tape from over her eyes and

mouth. Each victim was bruised on her breasts and each had a circular bruise on her right thigh. Each victim was choked. Each victim was beaten. (Ms. W. testified that appellant pummelled her with his fists. Ms. Ludlam's body showed areas of mild hemorrhage under the skin of her chest and scalp.) The underclothes of each were torn. Each victim was sexually abused. The chain necklace of each was removed. The pendants from both necklaces were later found in the victim's pocketbooks, while the necklaces themselves disappeared in both cases.

Appellant contends that there are dissimilarities between the two offenses. For example, one victim was 19 and the other was 24. More significantly, one victim was murdered and the other was not.

We agree that the two offenses are not identical. However, we find the

similarities to be sufficiently numerous and distinctive to justify an inference that both crimes were perpetrated by the same person. Appellant's contention that the extrinsic offense was irrelevant is meritless.

(b) In his eleventh enumeration of error, appellant contends that the extrinsic offense was inadmissible because, although he was convicted in 1976 of aggravated sodomy, he was acquitted on the rape count.

Appellant relies upon Ashe v. Swenson, 397 U.S. 436 (90 SC 1189, 25 LE2d 649) (1970) (holding that the concept of collateral estoppel is part of the double jeopardy prohibition of the Fifth Amendment, enforceable against the states through the Fourteenth Amendment), and two Fifth Circuit cases relying upon Ashe v. Swenson to hold that "where the state in

an otherwise proper prosecution seeks for any purpose to relitigate an issue which was determined in a prior prosecution of the same parties, then the evidence offered for such a relitigation must be excluded from trial . . ." Wingate v. Wainwright, 464 F2d 209, 215 (5th Cir. 1972). Accord, Blackburn v. Cross, 510 F2d 1014 (5th Cir. 1975).

These Fifth Circuit cases, of course, are not binding precedent for this court. Conner v. State, 251 Ga. 113 (5) (303 SE2d 266) (1983). Ashe v. Swenson does not answer the question whether double jeopardy precludes the evidentiary use of crimes for which there has been a prior acquittal or applies only in situations of reprosecution. The facts of Ashe v. Swenson involved only the latter situation. Other federal courts have rejected the notion that extrinsic crime

evidence is inadmissible per se if the defendant has been acquitted of the extrinsic offense. See, e.g., U.S. v. Van Cleave, 599 F2d 954 (10th Cir. 1979); U.S. v. Castro-Castro, 464 F2d 336 (9th Cir. 1972). Some courts have suggested that an acquittal is a factor that must be considered when balancing the relevance of the proffered evidence against the prejudice created by it. See, e.g. U.S. v. Smith, 446 F2d 200 (4th Cir. 1971); U.S. v. Phillips, 401 F2d 301 (7th Cir. 1968). Compare, Smith v. Wainwright, 568 F2d 362 (5th Cir. 1978) (holding that where the prosecution used an extrinsic offense to prove another crime, the conviction obtained thereby was not invalidated by a subsequent acquittal in the trial of the extrinsic offense, in view of the fact that the extrinsic offense need not have been proven beyond a

reasonable doubt in the first trial, and considering a jury's practical power to pardon).

Appellant was convicted in 1976 of aggravated sodomy. By its verdict, the jury rejected appellant's contention that the bondage and sexual abuse of Ms. W. was consensual.4 Therefore, its acquittal on the rape count indicates no more than that the jury was not convinced beyond a reasonable doubt that appellant achieved "penetration of the female sex organ by the male sex organ." OCGA § 16-6-1.

Admissibility of extrinsic offenses is not conditioned on their proof beyond a reasonable doubt. Williams v. State, supra. In any event, the relevance of the 1976 offense does not hinge on whether

4 Aggravated sodomy, of which appellant was convicted, is defined as the commission of sodomy "with force and against the will of another person." OCGA § 16-6-2.

appellant was able to actually consummate the crime of rape. Thus, it is not the case that "some issue necessary for the prosecution's case in the second trial has necessarily been found for the defendant in the first trial." Johnson v. Estelle, 506 F2d 347, 350 (5th Cir. 1975). (Emphasis omitted.)

We note that appellant was allowed to present to the jury the fact of his acquittal on the rape count. His contention that the 1976 crime was inadmissible, because of the acquittal, is meritless.

(c) In his twelfth enumeration of error, appellant raises several issues.

First, he contends that the trial court erred by failing to instruct the jury regarding the standard of proof that appellant committed the 1976 crime. We disagree. The admissibility of the

evidence is a matter for the court. Cf., Castell v. State, 250 Ga. 776 (10B) (301 SE2d 234) (1983). See also, Wright and Graham, supra, § 5249, pp. 533-534.

Second, he contends that the court's instructions were erroneous because the court failed to mention identity and modus operandi. The trial court charged the jury that it had admitted evidence regarding the 1976 crime "solely for you to decide whether it might tend to illustrate the defendant's motive, intent or state of mind with respect to the charges for which [he] is now on trial, and for no other purpose."

At trial, the state had contended that the prior crime showed, inter alia, identity. On appeal, the state contends that the prior crime showed identity by demonstrating a modus operandi. However, at trial, the state did not object to the

court's instruction, which failed to mention identity as a purpose for the admission of the evidence.

A similarly defective instruction was considered in U. S. v. Baldarrama, 566 F2d 560, 567-568 (5th Cir. 1978). The Fifth Circuit had before it a circumstantial case in which the prior crime was "really necessary" to prove identity. Ibid. However, the trial court had failed to identify identity as a basis for the admission of evidence and had instructed the jury that the "prior conviction was introduced solely for the purpose of determining [the defendant's] intent, or to show a common scheme or design." Id at 567.

The Fifth Circuit said: "In all likelihood, the omission of 'identity' from the jury instruction was inadvertent, as the Government had previously stated

that identity was one of the possible uses of the evidence. The trial court's technical omission does not preclude our examination of the validity of identity as a basis for admission." Id at 567. Accord, State v. Johnson, 316 NW2d 652 (S.D. 1982).

We find this reasoning persuasive. Without determining whether the 1976 offense was admissible to show motive, which the court did charge, as well as modus operandi, which the court did not charge, we conclude that the instructions given do not preclude our identification of modus operandi as the most compelling justification for admission, nor do they preclude our consideration of the prior offense in our determination of the sufficient of the evidence to support appellant's convictions.

Finally, appellant contends that the

trial court further erred by failing to charge appellant's "sole defense" to the 1976 offense, i.e., consent, citing the rule that the failure to charge a defendant's sole defense is reversible error even absent a request. See, e.g. Johnson v. State, 135 Ga. App. 360 (4) (217 SE2d 618) (1975); Glaze v. State, 2 Ga. App. 704 (3) (58 SE 1126) (1907). Pretermitting whether this rule is applicable to an extrinsic offense, we find that the rule enunciated in Booker v. State, 247 Ga. 74 (274 SE2d 334) (1981) as to an affirmative defense applies, a fortiori, to sole defenses of extrinsic offenses. "If an affirmative defense is raised by the evidence, including the defendant's own statements, the trial court must present the affirmative defense to the jury as part of the case in its charge, even absent a request. The

affirmative defense, however, need not be specifically charged if the case as a whole is presented to the jury. [cit.]" Ibid.

In a case involving charges of rape and aggravated sodomy, the effect of a consent defense is simply to traverse the state's proof. Thus, the failure to specifically charge on consent as a sole defense to an extrinsic offense, absent a request for such charge, was not reversible error. Cf., Rivers v. State, 250 Ga,. 288 (8) (298 SE2d 10) (1982).

Appellant's twelfth enumeration of error is meritless.

(d) In his thirteenth and fourteenth enumerations of error, appellant complains of the trial court's refusal to give two of appellant's requests to charge. We find that neither request to charge was an accurate statement of the law and that the

trial court did not err by refusing to charge them.

(e) In his sixteenth enumeration of error, appellant contends (1) that the state failed to comply with an order requiring pre-trial determination of the admissibility of any prior criminal activity and (2) that prior conduct other than the 1976 crime was introduced and impermissibly placed appellant's character in issue.

Our review of the record persuades us that appellant's motion in limine did not seek a pre-trial, final ruling on the admissibility of prior conduct, that there was no order requiring a pre-trial determination of admissibility of any prior criminal activity, and that there was, in fact, no pre-trial ruling on the admissibility of any prior conduct other than the 1976 crime. See State v.

Johnston, 249 Ga. 413 (3) (291 SE2d 543) (1982). Thus, the rule announced in Harley-Davidson Motor Company v. Daniel, 244 Ga. 284 (1) (260 SE2d 20) (1979) is inapplicable to anything except the 1976 crime.

The first contention made in this enumeration of error is meritless. We address the instances of prior conduct in order:

(1) On Monday, November 23, 1981 (the day prior to the disappearance of Joy Ludlam), appellant purchased a vibrator. Appellant's only objection at trial was that the purchase was irrelevant and immaterial. No "character" objection was made. "An objection to the admission of evidence on the ground that it is 'immaterial and irrelevant' is not such an objection as it would be reversible error to overrule." Shouse v. State, 231 Ga.

716, 717 (4) (203 SE2d 537) (1974) (quoting Pippin v. State, 205 Ga. 316 (6) (53 SE2d 482) (1949).

(2) Appellant admitted on cross-examination that he had blackened the eyes of Pat Woods on Saturday prior to Ms. Ludlam's disappearance. He had already mentioned this in his direct examination, and when it came up again during the cross-examination, no objection was interposed, leaving nothing for us to review.

(3) Appellant admitted on cross-examination that he practiced sexual bondage. He had already admitted on direct examination that he had been introduced to bondage by his third wife who worked in a massage parlor. There was no objection to the cross-examination on this same subject, again leaving nothing for us to review.

(4) We reach the same result regarding appellant's testimony on cross-examination that he was still married to his third wife when he met Ms. W.

(5) There was no proper objection to appellant's admission on cross-examination that he had experienced anal intercourse with one of his wives.

(6) Regarding appellant's third wife, who worked at a massage parlor, the district attorney asked, "Did you ever encourage her to have relations with other men?" Appellant answered, "No, sir." Appellant's attorney objected to this question and answer on the ground that it was irrelevant and placed his character in issue.

We find that the question was improper and that the court erred by overruling the objection to it. However, in view of the

answer given, we conclude that the error was harmless. Johnson v. State, 238 Ga. 59 (230 SE2d 869) (1976).

(7) In appellant's home and at his leather shop were discovered a number of hand-drawn depictions of various sexual acts, including bondage, whipping, spanking and other deviancies. One drawing depicts a young, smiling woman with long, dark hair, who strongly resembles Joy Ludlam. Around her neck is what appears to be a chain necklace and a pendant.

Possession of these drawings was no crime. Stanley v. Georgia, 394 U. S. 557 (89 SC 1243, 22 LE2d 542) (1969). Thus, their admission in evidence did not violate OCGA § 24-9-20 (b). However, "the rule about the proof of other crimes is but an application of the wider prohibition against the initial

introduction by the prosecution of evidence of bad character." McCormick on Evidence, supra at 447. This wider prohibition is contained in OCGA § 24-2-2. Like OCGA § 24-9-20 (b), OCGA § 24-2-2 does not bar evidence simply because it might incidentally reflect on the defendant's character. If that were the case, the state could never prove the crime charged.

We find no error in the admission of these drawings. In arriving at this conclusion, we observe that this was not simply a case of a rape defendant possessing erotic literature.5 These drawings, particularly in conjunction with other evidence presented, tend to establish that appellant was motivated by

5 See Wright and Graham, supra, § 5240, pp. 482-483: "As one writer has suggested, evidence that a person was motivated by sexual desire does no establish that he intended to gratify those desires by the use of force. (Footnote omitted.)

a desire for forced and violent sex, and thus, help to establish that appellant was the person who violently sexually abused and murdered Joy Ludlam. The fact that one of the drawings depicts a young woman closely resembling Ms. Ludlam adds force to this conclusion.

(8) A witness for the state testified that he met appellant at the Holiday Inn where Ms. Ludlam worked, the evening before she disappeared. The district attorney asked the witness, "Did y'all do anything?" The witness answered, "Yes, sir, after we sit there for a while and talked, we went out into my van and smoked a joint."

Appellant's attorney moved for a mistrial, which was denied. No curative instructions were requested and none were given.

The state has not suggested how this

testimony might have been relevant. We find that it was not. However, we do not agree with appellant that the trial court erred by denying his motion for mistrial. Sabel v. State, 250 Ga. 640 (5) (300 SE2d 663) (1983). Moreover, while the court should have instructed the jury to disregard the answer of the witness, we find that, in this case, it is highly probable that testimony that appellant "smoked a joint" did not contribute to the verdict. Thus we find no reversible error. Castell v. State, 250 Ga. 776 (8) (301 SE2d 234) (1983).

(f) Appellant's fifteenth enumeration is answered above.

2. Next we address appellant's contentions regarding venue.

(a) In his fourth enumeration, appellant contends that the trial court erred by denying several pre-trial motions

seeking to dismiss all or part of the indictment on the ground that the grand jury did not hear sufficient evidence on venue to justify the return of a true bill on the indictment.

There is in this state some authority for the proposition that although the sufficiency of the evidence will not be inquired into, an indictment will be quashed where it is returned on wholly illegal evidence. See, e.g., Brown v. State, 121 Ga. App. 228 (1) (173 SE2d 470) (1970), which cites Meriweather v. State, 63 Ga. App. 667 (11 SE2d 816) (1940), which, in turn, cites Summers v. State, 63 Ga. App. 445 (3) (1 SE2d 409) (1940). In Summers, the Court of Appeals held that, "where . . . it appears that competent witness or witnesses were sworn and examined before the grand jury by whom the indictment was preferred, a plea in

abatement on the ground that it was found on insufficient evidence, or illegal evidence, or no evidence, will not be sustained, because it comes under the rule that no inquiry into the sufficiency or legality of the evidence is indulged." Id. at 449. (Emphasis supplied.)

We believe that Summers states the correct rule. Dicta in later cases implying any broader basis for quashing an indictment for lack of evidence will not be followed. See, e.g., Brown v. State, supra; Meriweather v. State, supra; and Reaves v. State, 242 Ga. 542 (2) (250 SE2d 376) (1978). Appellant contends that there was no evidence presented to the grand jury which would support a finding that proper venue lay in Houston County. However, it was shown by the state that competent witnesses were sworn and examined before the grand jury. Thus the

trial court did not err by denying appellant's pleas in abatement and motion to quash.

(b) OCGA § 17-2-2 provides, in part:

"(c) Criminal homicide. Criminal homicide shall be considered as having been committed in the county in which the cause of death was inflicted. If it cannot be determined in which county the cause of death was inflicted, it shall be considered that it was inflicted in the county in which the death occurred. If a dead body is discovered in this state and it cannot be readily determined in what county the cause of death was inflicted, it shall be considered that the cause of death was inflicted in the county in which the dead body was discovered.

"(h) Crime in more than one county. If in any case it cannot be determined in what county a crime was committed, it

shall be considered to have been committed in any county in which the evidence shows beyond a reasonable doubt that it might have been committed."

Appellant contends that in a case of homicide, use of subsection (h) to determine venue is precluded by subsection (c). We disagree. Subsection (h) applies by its terms to "any case."

Alternatively, he contends that if subsection (h) and subsection (c) may both apply to homicide cases, then subsection (h) is unconstitutionally vague and indefinite. We have already held that subsection (h) is not unconstitutionally vague or indefinite when applied in non-homicide cases. Adsitt v. State, 248 Ga. 237 (5) 282 SE2d 305) (1981); Bundren v. State, 247 Ga. 180 (1) (274 SE2d 455) (1981). We see no reason to hold to the contrary here. Appellant's sixth

enumeration of error is meritless.

(c) The court instructed the jury as follows:

"One of the elements in every criminal case is the matter of venue; that is, the state must prove that the crime occurred in the county in which the case is being tried. For example, if a crime occurrs in Houston County, then the trial for that crime shall be in Houston County.

"In a murder case, the trial may be held in the county where the cause of death was inflicted or in the county where death actually occurred, if it cannot be determined where the cause of death occurred.

"The defendant in this case contends that the state has not proved the element of venue. In that respect I instruct you that it is the state's burden, with respect to each charge in the indictment,

to prove beyond a reasonable doubt that the crime might have been committed in Houston County. If the state fails to do this, then the defendant is entitled to a verdict of not guilty."

In his fifth enumeration, appellant contends that this charge was error, not only because the court charged subsection (h) of the venue statute, but also because the court omitted to charge the jury that proper venue could lie in the county in which the body was found.

We find no error. The state contended that venue lay in Houston County, and the court correctly charged the state's burden of proof in that regard, as provided by subsection (h). Venue either was or was not appropriate in Houston County. That was the issue before the jury. That venue might also have been appropriate in Twiggs County, where the body was found, pursuant

to subsection (c), was not material to any issue before this jury.

Appellant's fifth enumeration of error is meritless.

(d) Appellant's seventh enumeraation of error is answered by the foregoing.

3. In his second enumeration, appellant contends that the trial court erred by failing to give his requested charge on the necessity of proving corpus delecti. The charge that the court did give, however, covered substantially the same principle. (The court charged that "the state must prove beyond a reasonable doubt that a crime was in fact committed. . .") This enumeration of error is therefore meritless. Kelly v. State, 241 Ga. 190 (4) (243 SE2d 857) (1978).

4. Appellant's first and third enumerations attack the sufficiency of the evidence. He was convicted of murder,

false imprisonment, rape, and aggravated sodomy.

(a) Appellant correctly observes that the evidence was circumstantial. However, when considered in its entirety, it compellingly demonstrates that appellant murdered Joy Ludlam and deposited her body in Scuffle Creek prior to the visit by police to his home on the evening of November 25. We find the conviction for murder to be amply supported by the evidence. Jackson v. Virginia, 554 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

(b) The evidence supports a finding that Joy Ludlam was bound at her wrists and ankles, gagged, and blindfolded, all against her will. She was therefore confined and detained without legal authority in violation of her personal liberty.6 Thus the evidence was

6 OCGA § 16-5-41 (a) provides: "A person commits the offense of false imprisonment

sufficient to support the conviction for false imprisonment.

(c) Warren Tillman, who conducted the original autopsy on the body of Ms. Ludlam, testified that areas of contusion around her vagina and anus were consistent with traumatic entry of these orifices by a male sex organ. Dr. Larry Howard and Dr. Whitaker, who examined the body after it was exhumed, agreed that these areas of contusion indicated traumatic entry and were not merely signs of decomposition. Although no seminal material was discovered in the examination of the body, it was observed that this was not unexpected, considering the lengthy immersion of the body in Scuffle Creek.

The offenses of rape and aggravated

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when, in the violation of the personal liberty of another, he arrests, confines, or detains such person without legal authority."

sodomy may be proven by circumstantial evidence. Payne v. State, 231 Ga. 755 (1) (204 SE2d 128) (1974). See also, Durham v. State, 243 Ga. 408 (1) (254 SE2d 359) (1979); Spraggins v. State, 240 Ga. 759 (1) 243 SE2d 20) (1978); Neal v. State, 152 Ga. App. 395 (1) (263 SE2d 185) (1979). "[W]here the jury is authorized to find that the evidence, though circumstantial, was sufficient to exclude every reasonable hypothesis save that of guilt, the appellate court will not disturb that finding, unless the verdict of guilty is unsupportable as a matter of law." Harris v. State, 236 Ga. 242, 245 (223 SE2d 643) (1976).

We conclude that the evidence was sufficient to convince a rational trier of fact beyond a reasonable doubt that appellant accosted the victim for purposes of achieving deviant sexual gratification

and that to his end she was bound and gagged, beaten, raped and sodomized. Thus, we find that the convictions for rape and aggravated sodomy are supported by sufficient evidence. Jackson v. Virginia, supra.

Appellant's first and third enumerations of error are meritless.

5. In his eighth and ninth enumerations of error, appellant complains of the denial of his motion to suppress and the admission in evidence of items allegedly seized illegally.

Joy Ludlam's body was discovered on December 8, 1981. Officers involved in the investigation were familiar with the facts of appellant's 1976 crime. The similarities were obvious. The last person known to have seen the victim alive was appellant. On December 9, application was made for warrants for the search of

appellant's automobile, home and leather shop.

The affidavits for these search warrants recited that the affiant was a detective with the Warner Robins police department assigned to investigate the disappearance of Joy Ludlam; that her body had been found the previous day in Twiggs County; that she had been murdered; that she had apparently been bound at the hands and feet and gagged with an adhesive substance; that her body was fully clothed except that her underwear had been torn at the crotch; that she had been sexually assaulted in the vaginal and anal areas; that she had bruises on her breasts; and that her jewelry was missing.

The affidavits further alleged that appellant had admitted to other officers that the victim had visited him at his home and office on the evening of November

24, 1981,, and that she had stayed approximately 30 minutes; that affiant had learned from a confidential source that the victim was at his residence for approximately two hours; that affiant had knnowledge of a previous offense committed by appellant; that the victim in the prior case had been bound with rope and gagged with tape; that, in the prior case, appellant had committed various sexual acts, including aggravated sodomy; and that the victim's underwear had been ripped, her jewelry removed, and her breasts injured.

The affidavits expressed the affiant's belief that the victim had been alive for approximately 10 days after she was reported missing; that a missing person report was issued for the victim, but that no one had seen the victim during this time, and that appellant was the last

person seen with the victim.

The affidavits alleged that the premises to be searched would contain hair, fibers, blood, adhesive and a gold necklace with a "Mickey Mouse" pendant.

Based upon the foregoing, the warrants were issued and the searches conducted.

On December 22, 1981, a warrant was issued to allow the seizure of hair from appellant's person, for comparison purposes.

After Warren Tillman advised investigators that the victim could have been dead for two weeks prior to the discovery of her body, a warrant was issued December 23, 1981, for the search of appellant's home. Additional hairs were discovered, but were not introduced at trial.

On January 18, 1982, another warrant was issued for the search of appellant's

home, but officers did not actually enter the house (they searched underneath it). This search did not result in the seizure of any evidence introduced at trial.

On March 10, 1982, officers learned that orange acrylic fibers had been found on the victim's coat. An orange and yellow blanket had been observed, but not seized, during the December 9 search of appellant's home. Three additional warrants were issued, for appellant's home and automobile, and for the home of appellant's parents. Supporting affidavits were similar to previous ones, with the addition of information regarding the fibers and the blanket. The search of the automobile turned up nothing which was introduced at trial. The other two warrants were not executed, because the blanket was discovered during a consent search of the home of appellant's parents.

On March 29, officers made their final application for a search warrant. The supporting affidavit was similar to previous ones. In addition, affiant, having benefit of the department's purchase of a new, powerful vacuum cleaner, alleged that he wished, "to search specifically the bedrooms, washer and dryer, drains and carpets in more detail and using mechanical equipment to gather the hair and fibers." During the search, hairs were recovered from the furnace grate, the dryer lint filter, the dryer vent, and from appellant's bedroom. These hairs were introduced at trial.

(a) Appellant contends that misleading information was given to the issuing magistrate, that material information was withheld from the magistrate, and that the information before the magistrate did not support the

issuance of the warrant. We must disagree.

The affidavits are perhaps not perfect. But we find no material inaccuracies or misrepresentations. See Lee v. State, 239 Ga. 769 (3) (238 SE2d 852) (1977). Nor do we find the information insufficient to support the issuance of the warrants. "The issuing magistrate is not to be confined by [miserly] limitations or by restrictions on the use of his common sense." U. S. v. Chester, 537 F2d 173, 175 (5th Cir. 1976). "[T]he traditional standard for review of an issuing magistrate's probable cause determination has been that so long as the magistrate had a 'substantial basis for . . . conclud(ing)' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. [Cits.]" Illinois v. Gates, U. S. (103 SC

2317, LE2d) (1983). That standard was met in this case.

(b) There is no merit to appellant's contention that the searching officers were not entitled to seize lewd drawings not described in the warrants.

OCGA § 17-5-21 (a) requires that warrants "particularly describe [ ] the . . . things to be seized. . ." However, OCGA § 17-5-21 (b) provides that "[w]hen the peace officer is in the process of effecting a lawful search, nothing in [subsection (a)] shall be construed to preclude him from discovering or seizing . . . any item . . . other than the private papers of any person, which is tangible evidence of the commission of a crime."

It is not necessary that items seized under the "plain view" doctrine be contraband. Ibid; Texas v. Brown, U. S. (103 SC 1535, 1542, LE2d

) (1983). Nor are items immune from seizure simply because they might be characterized as "private papers." Mooney v. State, 243 Ga. 373 (254 SE2d 337) (1979). The drawings were discovered while searches were being legitimately conducted pursuant to warrants, while the officers were within the scope of the searches authorized, and were items associating appellant with the crime for which he was being investigated. Their seizure was lawful.

(c) The justice of the peace testified at the hearing on appellant's motion to suppress. His practice was to require pre-payment of a fee for applications for arrest warrants by private citizens. This fee was retained by him whether or not the application was granted. Regarding search warrants required by law enforcement officers, the

justice would send the county a bill at the end of each month. He testified that he would not bill the county for warrants that he refused to issue.

Appellant contends that the issuing magistrate was not "neutral and detached," citing Connally v. Georgia, 429 U. S. 245 (97 SC 546, 50 LE2d 444) (1977).

Prior to Connally, justices of the peace in Georgia who were not on salary were authorized to collect a fee if they issued a search or arrest warrant, but not if an application for such was denied. Connally found defective "the Georgia system for the issuance of search warrants by justices of the peace." 429 U. S. at 250.

Georgia law was amended in 1977, in response to Connally, and the present codification of that law provides that justices of the peace are entitled to a

fee whether they grant or deny an application for an arrest or search warrant. OCGA § 15-10-14. The constitutionality of our present system was upheld in Allen v. State, 240 Ga. 567 (242 SE2d 61) (1978).

There is no indication in this record that the county would have violated our law and refused to pay the justice of the peace for warrant applications that he denied. What appellant is essentially contending is that because this justice of the peace chose, on his own, not to bill the county for denied search warrant applications, he is disqualified from issuing search warrants, and that the officers who obtained the search warrants, and that the officers who obtained the search warrants in this case should be penalized for their failure to inquire of the justice of the peace as to his billing

habits by excluding from evidence the fruits of their searches. We do not find that to be the law. Cf. Thompson v. State, 248 Ga. 343 (285 SE2d 685) (1981).

Appellant's eighth and ninth enumerations of error are meritless.

6. In his seventeenth enumeration of error, appellant contends the trial court erred by refusing to grant his motion for severance.

A prosecutor is required by law to prosecute in a single prosecution all known crimes "arising from the same conduct" that are within the jurisdiction of a single court, subject to the discretion of the court, "in the interest of justice," to order that one or more of the charges be tried separately. OCGA § 16-1-7 (b) and (c).

Appellant's contention that the trial court abused its discretion by refusing to

sever the offenses rests upon the assumption that the 1976 offense was admissible only with regard to the charge of aggravated sodomy and was not admissible to prove the other offenses charged in this case. With this assumption we cannot agree. The prior offense was clearly relevant to prove the identity of Joy Ludlam's murderer.

The different crimes alleged in the indictment were too interwoven and interdependent to permit ready separation of the proof offered in support of each. We find no abuse of discretion in the trial court's refusal to sever. Gober v. State, 247 Ga. 652 (1) (278 SE2d 386) (1981).

7. At the close of the evidence, the trial court told the jury "that with respect to the robbery charge," he had formed the opinion "that the state's

evidence is insufficient to convict, and would not create a jury issue, and, therefore the matter of whether or not the defendant robbed the victim will not be before you in this case."

The charge of the court was prefaced by this admonition: "As I previously mentioned to you, the robbery charge is no longer before you because as a matter of law such charge was not proved. . ."

Appellant contends in his eighteenth enumeration that these instructions were inadequate. We find that, at least in the absence of any request for additional instruction, the instructions given were sufficient.

8. Prior to trial, two witnesses were hypnotized in an attempt to aid their recall of certain events.

On witness was the assistant manager of the lounge at the Holiday Inn on the

evening of November 23, 1981. Without hypnosis, he had recalled seeing appellant at the lounge that evening and he observed appellant engaged in a "casual conversation" with Joy Ludlam. No additional memories of the evening were uncovered by the hypnosis.

The other witness was one of the police officers who talked to appellant on November 2, 1981. The question was whether appellant had admitted to the officer only that Ms. Ludlam had made a telephone call from his residence or whether he had admitted that she had made a telephone call to the Holiday Inn. Appellant's testimony at trial was that she had made a call, but he did not know to whom. The officer testified that appellant had told him that she had called the Holiday Inn.

The Court heard the testimony of the

officer outside the presence of the jury and found that the officer's "account of the events made prior to hypnosis does not differ in any material respect from his account during hypnosis. . ."

(a) In his nineteenth enumeration, appellant contends the trial court erred by denying his motion to exclude the two witnesses. We do not agree. Regardless of the admissibility of hypnotically induced testimony, the testimony here was consistent with pre-hypnotic statements of the witnesses. The court did not err by allowing the witnesses to testify. Collier v. State, 244 Ga. 553 (1) (261 SE2d 364) (1979).

(b) In his twentieth enumeration, appellant contends that the trial court erred by failing to fully and properly instruct the jury on the use and reliability of hypnosis.

The court charged: "If you find that any witness has been placed under hypnosis for the purpose of refreshing or improving that witness' recollection, and if you find that such testimony is in whole or in part induced by the hypnosis, then to the extent that it was you would disregard such testimony."

We do not agree that this charge was incomplete, vague, or confusing, and find no merit to his enumeration of error.

9. As Warren Tillman conducted the autopsy, he dictated his impressions and observations into a tape recorder. He subsequently issued a written report of his findings.

Prior to trial, appellant sought access to this tape recording and any notes made by personnel of the state crime lab. His motion for production of physical evidence was in this respect

denied. In his twenty-first enumeration, he contends this denial was error. We disagree.

Appellant was given copies of the autopsy report and of all other written scientific reports. See, Law v. State, 251 Ga. 525 (2) (SE2d) (1983). His expert was able to examine these reports and, as well, the photographs taken during the autopsy and tissue slides from the second examination of the body. Moreover, it is apparent from the testimony of appellant's expert that he had personally discussed the autopsy with Warren Tillman. We do not believe that Tillman's tape-recorded notes amount to "a piece of critical evidence whose nature is subject to varying expert opinion," Barnard v. Henderson, 514 F2d 744, 746 (5th Cir. 1975), or that appellant was denied the means necessary

to conduct his defense. Sabel v. State, 248 Ga. 10 (6) (282 SE2d 61) (1981). This enumeration of error is without merit.

10. In enumerations of error 22 through 24, appellant complains of the admission in evidence of certain photographs and of the court's refusal to give a requested charge thereon.

(a) Three photographs showed close-up views of incisions made by Dr. Howard for purposes of preparing tissue slides. Appellant contends that these photographs were inadmissible under the rule announced in Brown v. State, 250 Ga. 862 (5) (302 SE2d 347) (1983). We need not answer this contention, however, as this case was tried before Brown was decided. We have held that Brown has prospective operation only. Grant v. State, 251 Ga. 434 (306 SE2d 265) (1983).

We have examined these photographs.

They are depicted from such a close perspective that only the incisions and a small portion of the surrounding skin are visible. These photographs illustrated Dr. Howard's testimony and we conclude that their admission was not reversible error. Ramey v. State, 250 Ga. 455 (1) (248 SE2d 503) (1983).

(b) Photographs taken of the victim at the scene of the first autopsy were admitted in evidence. These photographs were taken before any incision was made and they were relevant to material issues in the case. The court did not err by allowing their admission in evidence. Blankenship v. State, 247 Ga. 590 (8) (277 SE2d 505) (1981).

(c) Also admitted were photographs of the victim's body lying on the bank of Scuffle Creek, which showed the clothes she was wearing, the ripped underwear, the

lines of adhesive on her face, scuffed marks on the legs of her hose, and bruises on her neck and arm.

Appellant's request to charge--that the photographs of the body were admitted only for the purpose of showing the injuries inflicted upon the victim and that any portion of the photographs other than such injuries should not cause prejudice against the defendant--was incorrect. The admissibility of the photographs was not so limited, and appellant was not entitled to an instruction that the jury disregard prejudicial portions of the state's case. "Doubtless, photographs of the victim are prejudicial to the accused, but so is most of the state's pertinent testimony." Blankenship, supra at 596.

11. In his thirty-first enumeration, appellant contends that testimony by

detective Joel Sullivan required a mistrial and that the court's denial of appellant's motion for mistrial was reversible error.

We set forth the pertinent portions of the cross-examination leading up to the answer in question:

"Q [By Mr. Hasty for appellant]: Do you remember any threats being made by your investigators, you or your investigators against Mr. Felker at that particular time?

"A. [By detective Sullivan]: No, sir, I don't.

"Q Do you recall telling me down here in the clerk's office that you and 12 investigators started to go over there and kill him at the time you got those pictures back?

"A No, sir, I don't.

"Q You didn't tell me that?

"A No, sir, I don't recall saying that to you.

"Q Down in the clerk's office in this courthouse, Mr. Sullivan?

"A No, sir, I --

"MR. FINLAYSON: Your Honor, I think he's answered that question now three times.

"THE COURT: Yes, sir.

"MR. HASTY: Excuse me just one second, your Honor please.

"Q (By Mr. Hasty): I'm specifically referring to November 5, 1982, Mr. Sullivan, and I'll ask you if you remember being there in the presence of me and a lawyer from Warner Robins, I think maybe from Perry, I'm not sure, and I cannot remember his name, and having a conversation with us at that time?

"A I remember having one conversation with you out in the hall outside the

clerk's office when you asked me if we had anything else on Wayne Felker, and maybe we could work a deal out for a lesser sentence.

"Q I'm asking you --

(Laughter in the courtroom.)

"MR. HASTY: Your honor please, now, that was certainly not responsive to my question --

"THE WITNESS: That's the only conversation I remember.

"MR. HASTY: --and I would certainly, I would certainly move for a mistrial in relation to that response.

"THE COURT: Well, I'm going to deny your motion for a mistrial, Mr. Hasty. It was given in response to a question you asked him, although you certainly could argue that it went beyond the response you were seeking.

"I'm going to instruct the jury to

disregard the response of the officer in that respect, and not let it bear on your decision in this case."

Appellant contends that since the witness was a law enforcement officer, his statement was as a matter of law so prejudicial that a mistrial was required, citing Boyd v. State, 146 Ga. App. 359 (2) (246 SE2d 396) (1976). However, in Sabel v. State, 250 Ga. 640 (5) (300 SE2d 663) (1983), this court rejected the notion that Boyd establishes such a per se rule.

Moreover, in view of the testimony as a whole, the answer was not entirely unresponsive. The witness was asked time and again if he remembered a conversation in the clerk's office in which the witness had threatened appellant or had expressed a desire to kill him. Time and again the witness answered that he did not remember any such conversation. Counsel persisted,

and finally the witness answered that the only conversation he could remember was one in which counsel had expressed an interest in working out a deal.

Although one may legitimately complain about illegal testimony which is not responsive to the question, one cannot take chances in propounding questions which may elicit damaging answers, otherwise inadmissible, and then demand a mistrial when such answer is given. Henderson v. State, 208 Ga. 73, 75 (65 SE2d 175) (1951).

Reviewing the relevant circumstances, we find that the trial court did not abuse its discretion in denying the motion for mistrial. Tyler v. State, 251 Ga. 381 (3) (306 SE2d 263) (1983).

12. In his thirty-second enumeration, appellant contends that the testimony of the 1976 victim should have been excluded

because she had been "secreted" from appellant's counsel by the state.

After she was sodomized by appellant in 1976, the victim married and moved out West. She was located by the state and agreed to return to Georgia for the trial of this case.

Prior to trial, the state furnished appellant with a list of witnesses. See OCGA § 17-7-110. On the list was the victim's former name as well as her married name.

OCGA § 17-7-110 does not require the state to furnish the addresses of witnesses. Holsey v. State, 235 Ga. 270 (2) (219 SE2d 374) (1975). Nonetheless, many addresses were ordered to be furnished. However, since appellant had available to him the transcript of the previous trial, the court refused to require the state to furnish appellant

with the address of the 1976 victim. The court pointed out that it did not mean to say that this witness would be unavailable for interview by appellant's counsel before she testified.

The witness arrived in Warner Robins more than a week prior to the commencement of trial. Appellant contends that because the state did not inform him of her whereabouts, the witness was unlawfully withheld from him, citing Wilson v. State, 93 Ga. App. 229 (91 SE2d 201) (1956).

In Wilson, the only eyewitness to the crime was being held in jail as a material witness. The sheriff and the solicitor-general refused to allow the defendant to see the witness. The defendant moved the court for permission to interview the witness, but the motion was denied. This denial was held to be reversible error.

In this case, all that appellant sought was an address, which the state was not compelled to furnish. Although the witness did not testify until the third day of testimony, after a week had been spent selecting a jury, appellant never sought to inquire whether the witness had arrived in Warner Robins, nor did he ever ask the court for an opportunity to interview the witness prior to her testimony.

We conclude that appellant has failed to demonstrate that he was denied access to this witness.7 Rutledge v. State, 245 Ga. 768 (2) (267 SE2d 199) (1980).

13. In enumerations of error 33 through 37, appellant complains of the

7 We note that appellant had available to him the transcript of the previous testimony of the witness and that he does not now contend that any of her testimony in this case was inconsistent with her previous testimony or that it otherwise surprised him.

court's charge.

(a) In enumeration 33, he contends the court erred by refusing to give a request to charge that a defendant's attorney has not only the right, "but the plain duty" to interview any persons who might be able to assist him. He contends that this charge was necessary because the 1976 victim was withheld from him. We do not follow this reasoning, and, in any event, find the requested charge to be more harmful than helpful to appellant, in view of a defendant's right not to testify or present evidence. The court did not err by refusing to give it.

(b) Appellant requested a charge that "a verdict is never demanded in a criminal case in favor of the State where the defendant, in his testimony, denied his guilt." The court refused to give his requested charge. Instead, after defining

reasonable doubt, the court charged: "If, after you consider all the facts and circumstances in the case, your minds are wavering, unsettled and unsatisfied, then that is the doubt of the law, and you should acquit the defendant. On the other hand, if such doubt does not exist in your minds as to his guilt, you should convict him."

Appellant correctly observes that a jury has the power to disregard the law and refuse to convict for reasons unrelated to factual guilt. He contends that the jury must be so instructed. We disagree.

"[T]he undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence[,] . . . is a power that must exist as long as we adhere to the general verdict in criminal cases. . ."

United States v. Moylan, 417 F2d 1002, 1006 (4th Cir. 1969). However, that "is not to say that the jury should be encouraged in their 'lawlessness.'" Ibid.

The duty of a jury is to be distinguished from its power. Its duty is to apply the law to the facts and to reach a verdict which speaks the truth. Harris v. State, 190 Ga. 358 (9 SE2d 183) (1940); Griffin v. State, 154 Ga. App. 261 (4) (267 SE2d 867) (1980). If, after considering all of the evidence, the jury finds that the state has carried its burden of proving beyond a reasonable doubt every essential allegation in the indictment, and is convinced beyond a reasonable doubt of the defendant's guilt of the crime charged, it should convict. The court's instruction to this effect was not error.

Salisbury v. State, 221 Ga. 718 (2)

(146 SE2d 776) (1966), relied upon by appellant, is inappposite. The court's charge there, in effect, restricted the jury to a consideration of the state's evidence. Here, the court's instructions clearly required a consideration of all of the evidence. Cape v. State, 246 Ga. 520 (8) (2/2 SE2d 487) (1980).

Enumerations 34 and 36 are without merit.

(c) On the credibility of witnesses, the court charged as follows:

"You are the sole judges of the credibility of the witnesses and of the weight to be given their testimony. In deciding the credit to be given any witness' testimony, you may take into account his or her ability and opportunity to observe the facts; his or her memory; the witness' manner while testifying; any interest, bias or prejudice the witness

may have, and you may also consider the reasonableness of such testimony.

"If there are conflicts in the evidence, it is your duty under the law to reconcile them wherever possible so as to make all the witnesses speak the truth and not attribute a false statement to any of them. If you cannot do this, however, then you would believe that testimony which is most reasonable and credible to you.

"A witness' testimony may be impeached or discredited by disproving the facts testified to by him or her, or by showing that the witness made a previous statement or statements inconsistent with or contradictory to the testimony given at trial.

"If you determine that the testimony of any witness has been impeached or discredited in that manner, you are

authorized to believe or disbelieve said witness' testimony in whole or in part."8

In his thirty-fifth enumeration, appellant argues that: "[C]ombining the duty to convict and the duty to make all the witnesses speak the truth was error, because the jury was not thereby given the option of disregarding the testimony of a witness not technically impeached. . . The trial judge instructed the jury to consider all of the testimony as the truth and thereby asked them to construe the testimony so as to remove the reasonable doubt in their minds. Then he instructed the jury to convict if there was no reasonable doubt. In effect, he instructed the jury to convict the

8 The court also gave instructions on hypnotically induced testimony, see Division (8b) ante, and expert testimony. Since these portions of the charge are not complained of here, they are not reproduced above, although they form a part of the court's charge on credibility of witnesses.

appellant." We disagree.

Jurors may not arbitrarily disregard the uncontradicted testimony of credible witnesses. See Western & Atlantic R. Co. v. Beason, 112 Ga. 553 (1) (37 SE 863) (1901). Moreover, where there are conflicts in the testimony of witnesses, it is the duty of the jury to reconcile these conflicts if possible so as to make every witness speak the truth. Cotton v. State, 81 Ga. App. 753, 755 (59 SE2d 741) (1950). Neither of these rules, however, mean that the jury is obliged to believe testimony which, under the facts and circumstances disclosed, they discredit. Fincer v. Harlow, 56 Ga. App. 578, 581 (193 SE 452) (1937). In evaluating the credibility of witnesses, the jury may take into consideration such things as the witnesses' manner of testifying, their means and opportunities of knowing the

facts to which they testify, their interest or lack of interest in the case, and the probability or improbability of their testimony. Harris v. State, 2 Ga. App. 406, 408 (58 SE 669 (1907).

"The credibility of a witness is a matter to be determined by the jury under proper instruction from the court." OCGA § 24-9-80. The charge given accurately stated the law. Collum v. Georgia Ry. & Electric Co., 140 Ga. 573 (6) (79 SE 475) (1913); Brown v. State, 10 Ga. App. 50 (2) (72 SE 537) (1911). The court did not, in effect, "instruct the jury to convict the appellant," and this enumeration is meritless.

(d) Appellant requested the court to charge: "[W]hile it is the duty of each juror to discuss and consider the opinions of the other jurors, each juror must decide the case upon his own opinion of

the evidence. In deciding the question of reasonable doubt, each juror must decide for himself." The court's refusal to charge this request is alleged as error in enumeration 37.

In Smith v. State, 63 Ga. 168 (20) (1879) we held: "The jury are to act as a body, and should be charged as a body. The individual jurors are not to be addressed in the charge in a way to discourage mental harmony and concert. It is not encumbent upon the court to stimulate their individuality by charging, at the prisoner's request, 'that each juror must be satisfied for himself, from the evidence, of the guilt of the defendant, before he can lawfully agree to a verdict of guilty.'" Id. at 170.

Such a charge is another way of telling a jury that its verdict must be uanimous, and agreed to by each of its

members. While trial courts often include in their charge such an instruction, none of the few cases on the subject has ever held such a charge to be mandatory.

In this case, the jury was polled after verdict. Each juror was asked if the verdict that the jury had just publisned was his verdict, if it had been arrived at freely and voluntarily by the juror, and if it remained his verdict. Every juror gave affirmative answers to all three questions. Thus, there can have been no harmful error resulting from the court's failure to give either the requested charge or a charge covering substantially the same principles. Maddox v. State, 233 Ga. 874 (2) (213 SE2d 654) (1975).

SENTENCE REVIEW

14. In enumerations 25, 26 and 28, appellant contends that the death penalty

is cruel and unusual punishment, that Georgia law providing for its imposition is unconstitutional, and that our appellate review is defective. None of these enumerations of error has any merit. See, e.g., Gregg v. Georgia, 428 U. S. 153 (96 SC 2909, 49 LE2d 859) (1976); Mincey v. State, 251 Ga. 255 (4) (304 SE2d 882) (1983); Putman v. State, 251 Ga. 605 (11) (308 SE2d 145) (1983). We note that appellant's contention that, in conducting our proportionality review, we "compare [ ] death cases only with those cases in which the death penalty has been sought by the state," is incorrect. See Horton v. State, 249 Ga. 871, 880 (295 SE2d 281) (1982) (footnote 9).

15. Appellant's twenty-seventh enumeration, challenging the practice of death-qualification of jurors, is likewise meritless. Mincey v. State, supa, (2).

16. In enumeration 29, appellant contends that the trial court erred by charging: "Members of the jury, you are authorized to impose either the death penalty or life imprisonment as to the murder conviction in this case."

Viewed in isolation, this portion of the charge was, at best, incomplete. It is true that the jury had for its consideration two possible punishments with respect to the murder conviction. Appellant would be sentenced on the other convictions by the court. However, this portion of the charge, by itself, did not inform the jury that it would be authorized to impose a death sentence only if it found at least one statutory aggravating circumstance beyond a reasonable doubt. OCGA § 17-10-30 (c). Nonetheless, other portions of the charge did. In passing upon the merits of this

enumeration of error, we do not consider fragments of the charge in isolation. Instead, we must examine the charge as a whole to see whether reasonable jurors were properly informed of the law. Ranger v. State, 249 Ga. 315 (7) (290 SE2d 63) (1982); Brown v. Mathews, 79 Ga. 1 (4 SE 13 (1887).

The charge, considered as a whole, clearly instructed the jury that it could not recommend a sentence of death unless it found at least one statutory aggravating circumstance beyond a reasonable doubt. In addition, the jury was informed that even if it found a statutory aggravating circumstance, it could nonetheless refuse to impose a sentence of death. Thus, we find no reversible error in the court's charge. Conner v. State, 251 Ga. 113 (4) (303 SE2d 266) (1983).

17. In enumerations 39, appellant contends the trial court erred by instructing the jury that, in considering the sentence to be imposed, the jury could consider evidence presented during the guilt phase of the trial. This enumeration is meritless. Blankenship v. State, 251 Ga. 621 (308 SE2d 369) (1983).

18. Appellant was allowed to present the testimony of a political science professor, two professors of religion, and a Presbyterian minister concerning their religious and philosophical objections to the death penalty. Their testimony included a description of the process of electrocution and expressions of opinion that the death penalty is not a deterrent to crime. We have previously held that such testimony is irrelevant to the issues to be decided by the jury in the sentencing phase. Horton v. State, supra

(5); Stevens v. State, 247 Ga. 698 (24) (278 SE2d 398) (1981); Franklin v. State, 245 Ga. 141 (7) (263 SE2d 666) (1980).

The political science professor testified that, for a variety of reasons, the death penalty was not an effective deterrent. Then appellant asked about her general attitude toward the death penalty. She answered: "Personally, I'm opposed to capital punishment. I don't think it's an effective deterrent, and that's a judgment that I really make on the basis of study and really I would regard as science; but on a personal level, were someone to ask about my own religious beliefs, you know, I would be opposed." Appellant asked, "In all circumstances?" The witness answered, "In all circumstances. I prefer life without parole." (Emphasis supplied.)

On cross-examination, the state asked the witness if she felt that incarceration

was a deterrent. She answered in the negative: "Oh, I see a benefit; oh, certainly, but I don't see a deterrent benefit." She agreed that the death penalty would incapacitate the offender from committing another crime. Then the following transpired:

"Q. [By the state]: And I believe you stated that you were unalterably and conscientiously opposed to capital punisnment.

"A. Right; that's correct.

"Q. Under any circumstances?

"A. Under any circumstances.

"Q. You also said that personally you favored a life sentence without parole?

"A. As an alternative, yes.

"Q. Well, imagine for a moment that such an animal doesn't exist. Does your situation change?

"A. No, basically it wouldn't; it

wouldn't."

Appellant moved for a mistrial. He now contends that the court's refusal to grant his motion was error. We disagree.

The personal beliefs of the witness were injected into the case by the derendant, with the consent of the court,9 including her belief that she preferred life without parole. Appellant cannot now complain that the state cross-examined the witness about these believes. Tucker v. State, 245 Ga. 68, 72-73 (263 SE2d 109) (1980).10

9 By way of a motion in limine, appellant successfully sought a pre-trial ruling in his favor on the admissibility of such testimony. The state's objection to the testimony of these witnesses was overruled.

10 We have not overlooked Tucker v. Francis, F2d (11th Cir., No. 83-8466, decided January 16, 1984), in which a panel of the 11th Circuit set aside Tucker's death penalty because among other things, the prosecutor had argued to the jury the possibility of parole in the event of a life sentence.
Our response is that, in addition to

19. Appellant's mother testified on direct examination, at the sentencing phase of the trial, that her son had been sent to prison some time after he was arrested in October 1976, that he had stayed in prison four years, and that he had been released in December of 1980.

In argument, the district attorney stated: "[Felker] received a 12-year

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the failure to recognize that the necessity for incapacitation is a legitimate area of inquiry in a death penalty case (see Jurek v. Texas, 428 U. S. 262 (96 SC 2950, 49 LE2d 929) (1976)), the panel failed to recognize our holding on direct appeal that any possible error regarding the injection of the possibility of parole was induced by the defendant. The panel failed to mention that evidence of a prior parole had been introduced by the defendant, failed to consider the effect of the defendant's failure to interpose any objection to the state's argument, failed to note that the defendant had argued the issue himself, and failed to accord any weight to our procedural resolution of the case, in violation of Wainwright v. Sykes, 433 U. S. 72 (97 SC 2497, 53 LE2d 594) (1977) and Engle v. Isaac, U. S. (102 SC 1558, 71 LE2d 783) (1982).

sentence and served eight, and I think his mother said that he was released from prison December 19, 1980. That's when he married Patsy, his fifth wife, December 19, 1980. When did this crime occur? November 24, 1981, just about 11 months from the time that he was released from prison."

Appellant contends that the district attorney made an argument concerning parole, in violation of OCGA § 17-8-76. We disagree. The argument was very similar to the one made in Horton v. State, supra, 249 Ga. at 875-876. It made no reference to parole and was not otherwise improper.

20. The jury found two statutory aggravating circumstances: "(1) That the offense of murder was committed while the offender was engaged in another capital felony, to wit: rape (2) that the offense

was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture or depravity of mind." OCGA § 17-10-30 (b) (2) and (b) (7).

(a) In Division 4c, ante, we held that the evidence was sufficient to support a conviction for rape. The same evidence supports the jury's finding of the § (b) (2) statutory aggravating circumstance.

(b) The evidence shows that Joy Ludlam suffered serious physical and psychological abuse prior to her death. She suffered serious sexual abuse before, and, perhaps, also, after her death. Thus, she was clearly "subjected to the unnecessary and wanton infliction of severe physical or mental pain, agony or anguish" and appellant was clearly shown to have committed the murder as the result of his "utterly corrupt, perverted, or

immoral state of mind." West v. State, Ga. (SE2d) (Case No. 40134, decided February 15, 1984).

The evidence was sufficient to authorize a finding that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind. Hance v. State, 245 Ga. 856 (3) (268 SE2d 339) (1980). The facts of this case distinguish it from those cases in which a finding of the § (b) (7) statutory aggravating circumstance would not be appropriate. Whittington v. State, Ga. (9b) (SE2d) (Case no. 40337, decided February 15, 1984); Phillips v. State, 250 Ga. 336 (6) (297 SE2d 217) (1982).

(c) The jury's finding of statutory aggravating circumstances is supported by the evidence. OCGA § 17-10-35 (c) (2).

21. After review of the record in

this case, we conclude that the sentence of death was not imposed under the influence of passion, prejudice, or other arbitrary factors. OCGA § 17-10-35 (c) (1).

22. The facts of this case are set forth at length elsewhere in the opinion. No further exposition is required here. Suffice to say, the sort of conduct proven in this case has been condemned by death in many other cases. We find that the sentence of death is not excessive or disproportionate to sentences imposed in similar cases, considering both the crime and the defendant. OCGA § 17-10-35 (c) (3).

23. Enumerations of error 30, 38 and 40 are answered by Divisions 18-22 of this opinion.

Judgment affirmed. All the

Justices concur.

APPENDIX "B"

SUBSTITUTED PAGES OF SUPREME COURT OF GEORGIA OPINION

The motion for a rehearing was denied today March 29, 1984

All the justices concur

MEMORANDUM

TO: SUPREME COURT CLERK'S OFFICE

FROM: JUSTICE BELL

RE: 40350. FELKER v. THE STATE.

Please substitute the attached pages 114 and 115 of the above referenced opinion. See pages 34 through 37 of Appendix "A".

Ga. 113 (5) (303 SE2d 266) (1983). Ashe v. Swenson does not answer the question whether double jeopardy precludes the evidentiary use of crimes for which there has been a prior acquittal or applies only in situations of reprosecution. The facts of Asne v. Swenson involved only the latter situation. Other federal courts have rejected the notion that extrinsic crime evidence is inadmissible per se if the derendant has been acquitted of the extrinsic offense. See, e.g., U. S. v. Van Cleave, 599 F2d 954 (10th Cir. 1979); U. S. v. Castro-Castro, 464 F2d 336 (9th Cir. 1972). Some courts have suggested that an acquittal is a factor that must be considered when balancing the relevance of the proffered evidence against the prejudice created by it. See, e.g. U. S. v. Smith, 446 F2d 200 (4th Cir. 1971); U. S. v. Phillips, 401 F2d 301 (7th Cir.

1968). Compare, Smith v. Wainwright, 568 F2d 362 (5th Cir. 1978) (holding that where the prosecution used an extrinsic offense to prove another crime, the conviction obtained thereby was not invalidated by a subsequent acquittal in the trial of the extrinsic offense, in view of the fact that the extrinsic offense need not have been proven beyond a reasonable doubt in the first trial, and considering a jury's practical power to pardon).

Appellant was convicted in 1976 of aggravated sodomy. The jury thereby rejected appellant's defense of consent, to that offense at least.4 In any event, identity was not an issue in the 1976 case. Thus, the acquittal on the rape

4 Aggravated sodomy, of which appellant was convicted, is defined as the commission of sodomy "with force and against the will of another person." OCGA § 16-6-2.

count does not indicate that the jury had a reasonable doubt that it was appellant, and not someone else, who bound and gagged the victim, ripped her underwear, bruised her, and removed her necklace.

The relevance of the 1976 offense does no hinge on whether appellant committed all of the elements of the offense of rape. Thus, it is not the case that "some issue necessary for the prosecution's case in the second trial has necessarily been found for the defendant in the first trial." Johnson v. Estelle, 506 F2d 347, 350 (5th Cir. 1975). (Emphasis omitted.)

We note that appellant was allowed to present to the jury the fact of his acquittal on the rape count. His contention that the 1976 crime was inadmissible, because of the acquittal, is meritless.

(c) In his twelfth enumeration of

error, appellant raises several issues.

First, he contends that the trial court erred by failing to instruct the jury regarding the standard of proof that appellant committed the 1976 crime. We disagree. The admissibility of the evidence is a matter for the court. Cf., Castell v. State, 250 Ga. 776 (10b) (301 SE2d 234) (1983). See also, Wright and Graham, supra, § 5249, pp. 533-534.

Second, he contends that the court's instructions were erroneous because the court failed to mention identity and modus operandi. The trial court charged the jury that it had admitted evidence regarding the 1976 crime "solely for you to decide whether it might tend to

APPENDIX "C"

JUDGMENT OF HOUSTON SUPERIOR COURT

(1) STATE OF GEORGIA, HOUSTON COUNTY

IN THE SUPERIOR COURT OF SAID COUNTY

THE STATE OF GEORGIA INDICMENT NO. 12405

VS. OFFENSE: RAPE, MURDER, AGGRAVATED SODOMY, FALSE IMPRISONMENT

ELLIS WAYNE FELKER

IN THE SUPERIOR COURT OF HOUSTON COUNTY, GEORGIA JANUARY TERM, 1983

The defendant, ELLIS WAYNE FELKER, on trial of the above stated case, at the January Term, 1983, of this Court, having been convicted of the charge and crime of murder, and the jury trying the case having recommended that the said ELLIS WAYNE FELKER be sentenced to death, and defendant now being before the bar of this Court, and showing no cause why the

sentence of the Court should not be pronounced:

IT IS CONSIDERED, ORDERED AND ADJUDGED BY THE COURT that you, ELLIS WAYNE FELKER, be taken from the bar of this Court, where you now stand, to the common jail of Houston County, Georgia, where you shall be safely kept and confined until you shall be removed therefrom by the official and in the manner provided by law, and under the terms and conditions specified by law, when you shall be delivered to the State Board of Corrections of the State of Georgia, for electrocution at such penal institution as may be designated by said Board. In such institution, you shall be submitted to the penalty of death by electrocution, as provided by law between the hours ten o'clock in the forenoon and two o'clock in the afternoon on the 23rd day of March, 1983, and may the Lord have

Mercy on your soul.

IT IS FURTHER ORDERED, That said execution be done by the Warden of the said State penitentiary, or a Deputy Warden thereof, who shall serve as executioner, together with at least two assistants, in the presence of two physicians, to determine when death supervenes, and an electrician, a suitable guard, and if you so desire, your counsel, relatives, and such clergymen and friends as you may desire to have present. So pronounced and ordered by the court, in Open Court, this the 7th day of February, 1983.

/s/ Theron Finlayson

District Attorney

/s/ Willis B. Hunt

Judge, Superior Court
Houston Judicial Circuit

(2) STATE OF GEORGIA, HOUSTON COUNTY

IN THE SUPERIOR COURT OF SAID COUNTY

THE STATE INDICMENT NO. 12405

VS. FOR RAPE

ELLIS WAYNE FELKER

Tried at January Term, 1983 and VERDICT OF GUILTY

WHEREUPON, The Defendant being before the Bar of this Court and showing no reason why the sentence of the Court should not be pronounced.

IT IS CONSIDERED, ORDERED AND ADJUDGED BY THE COURT

That you ELLIS WAYNE FELKER the defendant in the above-stated case, be taken from the Bar of this Court to the Jail of said County, where you shall be safely kept until demanded by a guard to be sent from the Penitentiary of this State for the purpose of conveying you to said Penitentiary, to whom you shall be

delivered, and by such guard you shall be safely conveyed to the Penitentiary of this State, or such other place or places as the State Board of Corrections of the State of Georgia may direct, and be punished by confinement and labor in said Penitentiary, or other place or places as may be directed as aforesaid, for LIFE to be commputed from this date, provided you remain in Jail and do not file any motion or other proceeding to interfere with the operation of this Sentence; in case any such motion or other proceeding is filed, and you remain in Jail pending the same, this Sentence will be computed from the final disposition of the same; in case supersedeas bond is furnished, this sentence will be computed from the time you return to custody after a final disposition of all pending matters affecting the execution of this sentence.

IT IS FURTHER ORDERED, That the Clerk of this Court notify the State Board of Corrections of the State of Georgia of your conviction and sentence, as required by law.

In Open Court this 18th day of February, 1983.

/s/ Willis B. Hunt

Judge, Superior Court
Houston Judicial Circuit

(3) STATE OF GEORGIA, HOUSTON COUNTY

IN THE SUPERIOR COURT OF SAID COUNTY

THE STATE INDICMENT NO. 12405

VS. FOR AGGRAVATED SODOMY

ELLIS WAYNE FELKER

Tried at January Term, 1983 and VERDICT OF GUILTY

WHEREUPON, The Defendant being before the Bar of this Court and showing no reason why the sentence of the Court should not be pronounced.

IT IS CONSIDERED, ORDERED AND ADJUDGED BY THE COURT

That you ELLIS WAYNE FELKER the defendant in the above-stated case, be taken from the Bar of this Court to the Jail of said County, where you shall be safely kept until demanded by a guard to be sent from the Penitentiary of this State for the purpose of conveying you to said Penitentiary, to whom you shall be

delivered, and by such guard you shall be safely conveyed to the Penitentiary of this State, or such other place or places as the State Board of Corrections of the State of Georgia may direct, and be punished by confinement and labor in said Penitentiary, or other place or places as may be directed as aforesaid, for TWENTY years, to be commputed from this date,

*THIS SENTENCE IS TO RUN CONSECUTIVE WITH THE LIFE SENTENCE IMPOSED IN THIS CASE AS TO THE RAPE COUNT.

provided you remain in Jail and do not file any motion or other proceeding to interfere with the operation of this Sentence; in case any such motion or other proceeding is filed, and you remain in Jail pending the same, this Sentence will be computed from the final disposition of the same; in case supersedeas bond is furnished, this sentence will be computed

from the time you return to custody after a final disposition of all pending matters affecting the execution of this sentence.

IT IS FURTHER ORDERED, That the Clerk of this Court notify the State Board of Corrections of the State of Georgia of your conviction and sentence, as required by law.

In Open Court this 18th day of February, 1983.

/s/ Willis B. Hunt

Judge, Superior Court
Houston Judicial Circuit

(4) STATE OF GEORGIA, HOUSTON COUNTY

IN THE SUPERIOR COURT OF SAID COUNTY

THE STATE INDICTMENT NO. 12405

VS. FOR FALSE IMPRISONMENT

ELLIS WAYNE FELKER

Tried at January Term, 1983 and VERDICT OF GUILTY

WHEREUPON, The Defendant being before the Bar of this Court and showing no reason why the sentence of the Court should not be pronounced.

IT IS CONSIDERED, ORDERED AND ADJUDGED BY THE COURT

That you ELLIS WAYNE FELKER the defendant in the above-stated case, be taken from the Bar of this Court to the Jail of said County, where you shall be safely kept until demanded by a guard to be sent from the Penitentiary of this State for the purpose of conveying you to said Penitentiary, to whom you shall be

delivered, and by such guard you shall be safely conveyed to the Penitentiary of this State, or such other place or places as the State Board of Corrections of the State of Georgia may direct, and be punisned by confinement and labor in said Penitentiary, or other place or places as may be directed as aforesaid, for TEN years, to be commputed from this date,

*THIS SENTENCE IS TO RUN CONCURRENT WITH THE LIFE SENTENCE IMPOSED IN THIS CASE AS TO THE RAPE COUNT.

provided you remain in Jail and do not file any motion or other proceeding to interfere with the operation of this Sentence; in case any such motion or other proceeding is filed, and you remain in Jail pending the same, this Sentence will be computed from the final disposition of the same; in case supersedeas bond is furnished, this sentence will be computed

from the time you return to custody after a final disposition of all pending matters affecting the execution of this sentence.

IT IS FURTHER ORDERED, That the Clerk of this Court notify the State Board of Corrections of the State of Georgia of your conviction and sentence, as required by law.

In Open Court this 18th day of February, 1983.

/s/ Willis B. Hunt

Judge, Superior Court
Houston Judicial Circuit

APPENDIX "D"

(1) CONSTITUTIONAL PROVISIONS

(a) Fourth Amendment.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(b) Fifth Amendment.

[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ...

(c) Eighth Amendment.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(d) Fourteenth Amendment.

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; ...

APPENDIX "D"

(2) STATUTORY PROVISIONS

O.C.G.A. § 17-10-30. Procedure for imposition of death penalty generally.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary

or arson in the first degree;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or innuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

APPENDIX "E"

PERTINENT QUOTATIONS FROM THE TRIAL TRANSCRIPT AND RECORD

(1) SEARCH WARRANTS ISSUE

Motion to Suppress Evidence Seized From Defendant's Home, Automobile and Leather Shop. Count I:

10. [S]earch warrant used to search defendant's said home was illegal and invalid in that no probable cause was shown to the said Justice of the Peace upon which a valid search warrant could be issued.

12. The items seized in said search were not designated in the search warrant or in the affidavit for the search warrant.... [S]aid seizure was therefore illegal.... [T]he searching officers and persons went on a general search of

defendant's residence as is prohibited by the Fourth Amendment of the Constitution of the United States.

14. The information contained in the affidavit for search warrant was stale and of no value in determining probable cause.

17. Some of the allegations contained in the affidavit were erroneous, as well as the conclusion drawn therefrom. The affiant, at the time of the affidavit, withheld facts and information known to him from the magistrate and which would have gone against a determination of probable cause had those facts and information been included in the affidavit or sworn testimony given to the issuing magistrate.

Note: Counts II, III, IV, V, VI, VII, VIII, IX and X of the motion attack the

various search warrants and concomitant searches of petitioner's house, shop, person and car on the same grounds as those set forth above.

Defendant's First Amendment to his Motion to Suppress Previously Filed on October 29th, 1982:

18(b) Affiant withheld from the Magistrate the facts that the defendant's house had been searched on November 25th by police officers and that Joy Ludlam had not been seen in the residence. Had this information been submitted to the Magistrate, it would have further negatived the existence of any probable cause for the issuance of the warrant. This paragraph is two-fold in its allegation that:

(1) There was no probable

cause pursuant to the facts stated in the affidavit in support of the search warrant and

(2) The affiant withheld information from the Magistrate which would have further negatived the existence of probable cause.

Amended Motion to Suppress Evidence.

1. By letter from the Court dated January 13, 1983, received by defendant's counsel on January 18, 1983 defendant received copies of police interviews with various witnesses designated in said letter. A copy of said letter is attached hereto as Exhibit "A" and by reference made a part hereof.

4. The statement of Robert Dunbar supplied stated that he was the owner of a Standard Service Station in Byron, Georgia

and that approximately six days after the victim was missing and on November 30th or December 1st Joy Ludlam came to his station in a car driven by a white male, tall and slender, about 18 or 19 years of age with shoulder length unkept light brown hair with no beard.

5. Also told to the police officers by Robert Dunbar, but not placed in the statement, was that he remembered the girl because of her picture in the paper asking for people to report having seen the girl. No picture of the victim was in the paper until after November 24th the date that the defendant saw the girl.

6. The statement of Lucille Snellgrove stated that she is the owner of a Phillips 66 Station on I-75 in Macon. That about 3:00 p.m. on November 24th she saw the victim wearing a red dress. She was in a car with a young, clean-cut while

male about 6'2". The white male was driving the car.

7. Had all of the above information been given to the Justice of the Peace, a detached and neutral magistrate would not have found probable cause for the issuance of the warrants.

8. A principal reason given to the magistrate for the issuance of the warrants was as follows:

S-2, the affidavit in support of the December 9, 1981 search of 800 McArthur Boulevard, swears that Wayne Ellis Felker admitted to Detective Pond and Upshaw that he had seen the deceased at his residence at 800 McArthur Boulevard on November 24, 1981. Further on it states that based upon affiant's investigation the last person having been seen with the deceased was Wayne Ellis Felker.

9. The December 9th search warrant

affidavit for the 1980 Ford Mustang (S-1) of defendant's swears the same thing. This is Count Three of the motion to suppress. In like fashion the affidavit for the search of defendant's leather shop (S-3) Count Four of the motion to suppress, states the same facts. In like manner the affidavit for the search of defendant's person (S-7) on December 22, 1981 designated as Count Five of defendant's motion to suppress states the same thing.

10. Said search warrants also alleged, as quoted from the affidavit in support of Count One (S-2), the 800 McArthur Boulevard search.

"On December 1, 1981, the Warner Robins Police Department disseminated to the news media in the Middle Georgia area a 'missing persons' report on the deceased. This report contained a physical

description and a clothing description. This report was widely circulated throughout the area. Investigation has revealed that during this period of time no person reported having seen the victim or known her location. Based on affiant's investigation, the last person having been seen with the deceased was Wayne Ellis Felker." (Last full paragraph on page 2 of affidavit.)

Defendant's Second Amendment to his "Motion to Suppress Evideence Seized From Defendant's Home, Automobile and Leather Shop":

16.(a) The Justice of the Peace, Nick J. Lazarus, who issued the said search warrant, was not a neutral and detached magistrate. Said Justice of the Peace departed from a judicial role to a law

enforcement role in Defendant's case. The circumstances under which the warrant was issued manifest that the magistrate fell short of that degree of detachment and neutrality required of magistrates by the Fourth and Fourteenth Amendments of the Constitution of the United States.

The trial court overruled petitioner's motions after an evidentiary hearing, the transcript of which comprises 364 pages of Volume 6 of the transcript.

The trial court's initial ruling denied all motions by letter to counsel. The letter forms an addendum to the record.

Petitioner's enumeration of error number 8 in his brief to the Georgia

Supreme Court challenged the validity of the search warrants. The enumeration read as follows:

8.

The trial court erred in denying appellant's motion (R-64-92) and amended motions (R-138-148, R-149-153, R-154-208, R-1543-49) to suppress evidence seized pursuant to invalid search warrants. The motions were overruled at V-9-52.

Selected quotations from the Georgia Supreme Court opinion:

5. In his eighth and ninth enumerations of error, appellant complains of the denial of his motion to suppress and the admission in evidence of items allegedly seized illegally. (Appendix A at 44.)

. . . . . .

Appellant's eighth and ninth enumerations of error are meritless. Appendix A at 52.

(2) COLLATERAL ESTOPPEL ISSUE

Amendment to Motion in Limine and Motion for Severance:

4. The question of whether or not the defendant was guilty of rape in the prior 1976 conduct which gave rise to the 1976 trial has been settled between the State of Georgia and this defendant by defendant's 1976 trial.

5. The doctrine of res judicata and equitable estoppel should prevent the State from the use of that prior conduct which was alleged to have constituted rape, in this trial for any purpose whatsoever.

6. The use by the State of any evidence of that particular past conduct would put defendant twice in jeopardy of his life and liberty in violation of the double jeopardy provisions of the Fifth Amendment of the Constitution of the United States as applied to the States via the Fourteenth Amendment to the United States Constitution.

A pretrial hearing was heard on petitioner's motions in limine. The trial court denied all motions by letter (addendum to record below).

Trial:

An objection to the use of the evidence was orally made at trial:

COURT: "[I] deem it to be a continuing

objection." V-12-617.

DEFENSE ATTORNEY: "Of course, we repeat that it's certainly double jeopardy. The man has already been tried on these charges." V-12-618.

Petitioner's enumeration of error number 11 in his brief to the Georgia Supreme Court challenged the admission of the alleged extrinsic offense of rape. The enumeration read as follows:

11.

The trial court erred by failing to grant appellant's Amendment to Motion in Limine and Motion for Severance (R-604-606, R-1072-74, overruled at V-12-621 and V-9-52). Since appellant was acquitted of rape in 1976, any evidence of rape in the instant cse should have been excluded because his acquittal triggered the

application of the principal of collateral estoppel embodied in the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution.

Selected quotation from Georgia Supreme Court opinion:

Appellant was convicted in 1976 of aggravated sodomy. The jury thereby rejected appellant's defense of consent, to that offense at least.4 In any event, identity was not an issue in the 1976 case.

. . . . . .

The relevance of the 1976 offense does not hinge on whether appellant committed all of the elements of the offense of rape. Thus, it is not the case that "some issue necessary for the prosecution's case in the second trial has necessarily been

found for the defendant in the first trial." Johnson v. Estelle, 506 F2d 347, 350 (5th Cir. 1975).

Appendix B at 116.

(3) SUFFICIENCY OF THE EVIDENCE ISSUE

Trial:

Motion at end of state's case:

DEFENSE ATTORNEY: "Judge, at this time, at the close of the state's evidence, we would move this court to enter a directed verdict in favor of the defendant in this case." V-12-721.

"The state has not shown or has not made out a circumstantial case against this defendant that excludes numerous other reasonable hypothesis. There is no direct testimony that this defendant has

harmed this victim in any way whatsoever." V-12-722.

THE COURT: "[T]hat is not to say that there aren't a lot of other hypothesis, which a fact finder would be authorized to adopt besides the one presented by the state and contended by the state ... it may be a very close question ..." V-12-733.

"I don't see it as demanding a verdict for the derendant. Consequently, I deny your motion for a directed verdict." V-12-734.

Motion at the close of all the evidence:

DEFENSE ATTORNEY: "We would renew all motions that we have previously made, and especially the motion for directed verdict on each count of the indictment." V-13-1010.

THE COURT: "All right, they're on the record, and denied as previously done by the court." V-13-1011.

In his brief to the Georgia Supreme Court, petitioner challenged the sufficiency of the evidence in enumeration of error number 1. The enumeration read as follows:

1.

The trial judge erred in failing to grant appellant's motion for directed verdict as to each count for reasons set forth below. The motion for directed verdict was made by appellant at the close of the State's evidence (V-12-721-733), overruled by the trial court at V-12-733. The motion was renewed at the close of all of the evidence and overruled. V-13-1010. Said motion for directed verdict should

have been granted because:

(a) The verdict of guilty for the offenses of murder, aggravated sodomy, rape, and false imprisonment was contrary to the evidence, without evidence to suppport it and strongly against the weight of the evidence. The verdict was contrary to law and the principles of justice and equity.

(b) The evidence submitted in support of the State's case was wholly circumstantial and failed to exclude every other reasonable hypothesis save that of the guilt of the accused.

(c) The evidence adduced failed to identify appellant as the perpetrator of the murder beyond a reasonable doubt.

(d) The evidence failed to prove the corpus delicti of rape and identity of alleged perpetrator.

(e) The evidence failed to prove the

corpus delicti of aggravated sodomy and identity of alleged perpetrator.

(f) The evidence failed to prove the corpus delicti of false imprisonment and identity of alleged perpetrator.

(g) The evidence did not establish venue of any of the offenses to be in Houston County.

Selected quotation from Georgia Supreme Court opinion:

4. Appellant's first and third enumerations attack the sufficiency of the evidence. He was convicted of murder, false imprisonment, rape, and aggravated sodomy.

(a) Appellant correctly observes that the evidence was circumstantial. However, when considered in its entirety, it compellingly demonstrates that appellant

murdered Joy Ludlam and deposited her body in Scuffle Creek prior to the visit by police to his home on the evening of November 25. We find the conviction for murder to be amply supported by the evidence. Jackson v. Virginia, 554 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979). Appendix A at 58.

CERTIFICATE OF SERVICE

This is to certify that have served a true and correct copy of the within and foregoing Petition for Certiorari upon the State by serving Mr. Michael J. Bowers, Attorney General, Judicial Building, Room 132, Atlanta, Georgia 30303, and Mr. Theron Finlayson, District Attorney, Houston County Courthouse, Perry, Georgia 31069 with sufficient postage affixed thereto to insure delivery.

This 12th day of July, 1984.

S. PHILLIP BROWN

Office - Supreme Court, U.S.
FILED
AUG 16 1984
ALEXANDER L. STEVAS
CLERK

NO. 84-85

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ELLIS WAYNE FELKER,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether this Court should decline to grant a writ of certiorari to examine the Supreme Court of Georgia's determination that evidence of an offense for which the Petitioner was not convicted may be admitted at a subsequent trial if relevant to the issues in the subsequent trial?

2.

Whether this Court should decline to grant a writ of certiorari to examine the Supreme Court of Georgia's determination that the Magistrate who issued warrants for the searches of the Petitioner's residence and automobile was neutral and detached?

3.

Whether this Court should decline to grant a writ of certiorari to examine the Supreme Court of Georgia's determination that the Magistrate who issued the search warrants had a substantial basis for concluding that searches would uncover evidence of wrong doing?

4.

Whether this Court should decline to grant a writ of certiorari to examine the Supreme Court of Georgia's determination that the searches conducted pursuant to valid search warrants were proper?

5.

Whether this Court should decline to grant a writ of certiorari to examine the Supreme Court of Georgia's

determination that the affidavits upon which the search warrants were based did not contain any material inaccuracies or misrepresentations?

6.

Whether this Court should decline to grant a writ of certiorari to examine the Supreme Court of Georgia's determination that the evidence presented at trial was sufficient to support the conviction and sentence imposed upon the Petitioner by the trial jury?

7.

Whether this Court should decline to grant a writ of certiorari to examine the Petitioner's claim that the death penalty cannot be imposed in an even-handed manner in Georgia when Petitioner failed to raise the issue in the state courts of Georgia?

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NO. 84-85

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ELLIS WAYNE FELKER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

The Petitioner, Ellis Wayne Felker, was found guilty of murder, rape, aggravated sodomy, and false

imprisonment after a trial by jury in Houston County, Georgia. A separate proceeding was held to determine what sentence would be imposed for the murder conviction. The trial jury found two statutory aggravating circumstances and sentenced the Petitioner to death for murder. (R. 1612-1613; T. 1305). The trial court sentenced the Petitioner to life for rape, twenty years for aggravated sodomy, and ten years for false imprisonment. (R. 1614-1616). Petitioner's Amended Motion for New Trial was denied on July 20, 1983. Petitioner then appealed his conviction and sentence to the Supreme Court of Georgia. Felker v. State, 252 Ga. 351, ___ S.E.2d ___ (1984). After considering all the Petitioner's

enumerated errors, and after reviewing the transcript of proceedings pursuant to the Unified Appeal Procedure, the Supreme Court of Georgia affirmed the convictions and sentences on March 15, 1984. Petitioner's motion for rehearing was denied March 29, 1984. Thereafter, Petitioner filed this petition for a writ of certiorari in this Court.

The facts of the case, as established by the evidence at trial and reiterated on direct appeal by the Supreme Court of Georgia, are as follows: Evelyn Joy Ludlam, a nineteen year old junior college student was employed as a cocktail waitress in Warner Robins, Georgia in November, 1981. Joy was not satisfied with her job as a cocktail waitress

because of her religious beliefs and had actively begun to seek other employment. While working as a cocktail waitress, Joy met the Petitioner, Ellis Wayne Felker, on Monday evening, November 23, 1981. The Petitioner was wearing a T-shirt which advertised, "The Leather Shoppe," a business that he owned. Joy talked with the Petitioner about the shop for awhile and then the conversation focused on the Petitioner's need for a seamstress. At trial, witnesses testified that Joy stated that the Petitioner offered to pay $200.00 a week for a seamstress. The Petitioner discussed the possibility of employment with Joy even though his "Leather Shoppe" had not operated regularly for months, the

electricity at the shop had been disconnected, and he was overdrawn on his account at the bank. In addition to admitting his poor financial state and his lack of work activity, Petitioner admitted discussing a job opportunity with Joy even though his present girlfriend, was looking for a job and was a qualified seamstress. (T. 873, 916-917, 919).

Joy visited the Petitioner's residence twice on November 24, 1981. The first visit was in the morning. Joy returned home after not being able to see the Petitioner's shop. That evening, Joy again visited the Petitioner. She made a call from the Petitioner's residence which resulting in her having the night off from her job. Joy was never again seen alive.

The next day the lady with whom Joy lived reported her missing. Police officers went to the Petitioner's residence because he was the last person known to have seen her. While talking to the officers, the Petitioner stated that he had opened and closed Joy's car door for her, but that he never got into her car, nor had she gotten into his car. Felker v. State, supra at 353.

Joy's mother searched for her daughter, and found her daughter's locked car in a parking lot of a bank in Warner Robins. After the police opened the car and searched it, they found a note stating, "I'm going to Atlanta to eat dinner with Wayne and some of his friends. They are GS-11's

on base. Joy." (T. 515). Felker v. State, supra at 353.

On the Tuesday following Joy's disappearance, before authorities knew what had happened to Joy, Petitioner gathered and threw away bondage equipment that he owned and discussed a possible false alibi with his girlfriend concerning his whereabouts when Joy disappeared. (T. 850-852). Petitioner took these measures even though no one knew Joy's whereabouts, if she were dead, or if bondage equipment had been used on her. (T. 855-856, 869).

Two weeks after she disappeared, Joy's body was discovered in a creek outside of Warner Robins, Georgia. An autopsy was conducted in which the medical examiner found evidence that

Joy had been bound, gagged, beaten, forcibly raped and sodomized. Felker v. State, supra at 353-354. The medical examiner tetified that Joy died as a result of asphyxiation. (T. 335). Although establishing time of death proved difficult due to the circumstances surrounding the murder, the medical examiner testified that Joy could have been dead for two weeks prior to the time she was discovered.

Hair and fiber evidence seized from the Petitioner's residence, car and business were transported to the State Crime Lab and analyzed. Fibers found on Joy's coat were consistent with fibers present in the Petitioner's residence. Hairs found on the victim's clothes, including her underclothes, were consistent with

Petitioner's head hairs. The hair and fiber evidence indicated that Joy had been in Petitioner's car, contrary to the Petitioner's statement.

In addition to testimony of witnesses, admissions by the Petitioner, physical evidence, and scientific analysis of hair and fiber evidence, the State presented evidence of an earlier similar incident committed by the Petitioner. The State was able to demonstrate at least eighteen similarities between the earlier incident and the instant case. After considering all the evidence presented by the State, the jury, as stated earlier, convicted the Petitioner of murder, rape, aggravated sodomy and false imprisonment.

Further facts may be developed herein as necessary for a more thorough illumination of the issues presented to this Court.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF A SIMILAR OFFENSE FOR WHICH THE PETITIONER WAS NOT CONVICTED.

The Petitioner contends that the trial court improperly admitted evidence of a similar offense for which the Petitioner was not found guilty. Respondent asserts that the Supreme Court of Georgia properly held that the trial court did not err by admitting evidence of the extrinsic crime.

Petitioner was previously indicted for rape and aggravated sodomy. After a trial by jury, the Petitioner was convicted of aggravated sodomy. He was not convicted of rape. Felker v. State, 144 Ga. App. 458, 241 S.E.2d 576 (1978). At trial, the State demonstrated at least eighteen distinct similarities between the prior crime and the instant offense. (T. 1091-1092). Petitioner contends that because he was not found guilty of rape, but was only found guilty of aggravated sodomy, the victim of the prior offense should not have been allowed to testify that the Petitioner raped her.

Petitioner relies upon Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972), to support his contentions.

The decision in Wingate v. Wainwright has been construed by the Court of Appeals in a later case. In Smith v. Wainwright, 568 F.2d 362 (5th Cir. 1978), a defendant was separately tried for breaking and entering and rape. Testimony of the alleged rape was admitted at his trial for breaking and entering for which he was eventually convicted. Subsequently, he was acquitted of the rape charge. On habeas review, the defendant contended that because he was acquitted of rape, testimony concerning the rape should not have been heard at his breaking and entering trial. Although the order of convictions is reversed, the reasoning of the Court of Appeals in Smith v Wainwright is applicable to this

case. The Court of Appeals reasoned that evidence of the rape was not admitted to show bad character but was simply admitted under a category the court termed "other acts" evidence which tended to identify the defendant as the perpetrator of the subsequent crime. Smith v. Wainwright, supra at 363-364. Accordingly, admission of evidence concerning "other acts" as opposed to other crimes, which evidence is relevant and identifies the defendant as the perpetrator of the subsequent crime is not prohibited by the Court of Appeals of this

Circuit.[1]

The panel decision in Albert v. Montgomery, 732 F.23d 865 (11th Cir. 1984) is inapplicable to the facts of this case. In Albert, the court held that evidence of a prior offense could not be admitted at a subsequent trial because at the prior trial identity was at issue and the jury found that the defendant was not the perpetrator of the crime. In the instant case identity was not at issue, at issue was whether the Petitioner committed all the elements of the crime. There

---

[1]Decisions of the Fifth Circuit Court of Appeals prior to September 30, 1981 are binding on the Eleventh Circuit Court of Appeals. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981).

was no doubt that the Petitioner committed the prior offense as evidenced by the jury's verdict. Additionally, as the Supreme Court of Georgia stated, "The relevance of the 1976 offense does not hinge on whether appellant committed all of the elements of the offense of rape. Thus, it is not the case that 'some issue necessary for the prosecution's case in the second trial has necessarily been found for the defendant in the first trial.'" Felker v. State, supra at 362.

It has long been the law in the State of Georgia that acquittal of a prior crime does not bar the admissibility of testimony as to that act in a subsequent proceeding. See Taylor v. State, 174 Ga. 52, 162

S.E.2d 504 (1931). The Supreme Court of Georgia has continued to follow the doctrine because acquittal does not mean that a defendant did not commit the prior acts.

> [Appellant's] acquittal on that charge does not establish as a matter of law for any purpose that the [victim] was untruthful in stating that Appellant committed the acts, nor does his acquittal necessarily as a matter of law belie any other evidence offered against him at that earlier trial. His acquittal merely establishes that the State had merely failed to prove his guilt of the crime beyond

a reasonable doubt according to legal standards.

Pollock v. State, 162 Ga. App. 757(1), 293 S.E.2d 38 (1982) citing State v.Johnson, 246 Ga. 654, 655, 272 S.E.2d 321 (1980). Accordingly, acquittal of an offense does not necessarily mean that a defendant did not commit the acts charged against him.

The Supreme Court of Georgia properly followed Georgia law in determing that the trial court properly admitted evidence of the extrinsic crime at Petitioner's trial. Additionally, as shown above, the Court of Appeals in this Circuit has stated that evidence of "other acts" of a defendant may be admissible at trial if relevant. Smith v.

Wainwright, supra. Because the Supreme Court of Georgia properly followed Georgia law, and because the reasoning in the Supreme Court of Georgia's decision and the Court of Appeal's decision is sound considering that a not guilty verdict does not mean that a defendant is innocent Petitioner's allegation does not present any issue for review by this Court.

B. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT THE MAGISTRATE WHO ISSUED WARRANTS FOR SEARCHES OF THE PETITIONER'S PROPERTY WAS SUFFICIENTLY NEUTRAL AND DETACHED FROM LAW ENFORCEMENT OFFICIALS.

Petitioner contends that the Georgia Supreme Court improperly determined that the Magistrate who issued the warrants for searches of the Petitioner's property was neutral and detached. Petitioner contends that as the Magistrate only billed the County for warrants he issued, he was neither neutral nor detached according

to the guidelines established in Connally v. Georgia, 429 U.S. 245 (1977). Respondent asserts that the Magistrate was neutral and detached pursuant to Connally v. Georgia, and that the Magistrate's voluntary billing policies were not improper.

In Connally v. Georgia, this Court found that the Georgia system for issuing search warrants was defective because a fee was authorized for warrants issued, while a fee was not authorized for warrants denied. Connally v. Georgia, supra at 250. As the Supreme Court of Georgia points out in its decision, the Georgia law was amended in 1977 in response to Connally v. Georgia. Presently, Magistrates may collect a fee whether they grant or deny an application for

an arrest or search warrant. O.C.G.A. § 15-10-14; Ga. Code Ann. § 24-1601. Felker v. State, 252 Ga. 351, 372 (1984); Allen v. State, 240 Ga. 567 (1978).

The facts of the instant case reveal that although the Magistrate was authorized to bill the County for warrant applications that he denied, the Magistrate voluntarily chose not to bill the County. Connally v. Georgia did not require that officers inquire into the billing habits of Magistrates, only that Magistrates could not be statutorily authorized to collect fees only when warrants were issued.

Finally, Respondent notes that Petitioner also asserts the Magistrate was not neutral and detached because

of the setting in which the search warrants were issued. In support of his argument, Petitioner asserts that on occasion, the Magistrate issued warrants at the police office rather than having the police come to his office. Petitioner seeks to transform a simply matter of small town convenience into constitutionally impermissible intermingling. Respondent submits that the place where the Magistrate issues the warrants is of no significance; the Magistrate need only be neutral and detached from the law enforcement mechanism. In this case, the Magistrate thoroughly reviewed the affidavits and considered all relevant testimony before issuing warrants, and was neutral and detached. During

pretrial hearings, the Magistrate so testified. (Transcript of pretrial proceedings, page 197). Accordingly, Respondent respectfully asserts that Petitioner's allegation does not present any issue for review by this Court.

C. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT THE WARRANTS ISSUED FOR THE SEARCHES OF PETITIONER'S PROPERTY WERE BASED ON SUFFICIENT PROBABLE CAUSE.

Petitioner contends that the Supreme Court of Georgia improperly determined that the warrants issued for searches of the Petitioner's property were based on probable cause. Respondent contends that sufficient information was provided to the Magistrate prior to the warrants being issued.

Traditionally, the standard for reviewing an issuing Magistrate's

probable cause determination has been that the determination will stand so long as the Magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing. Illinois v. Gates, ___ U.S. ___, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983). In the instant case, the Supreme Court of Georgia found that the affidavits upon which the Magistrate based his determinations were perhaps not perfect, however they did not contain any material inaccuracies and were sufficient to support the issuance of warrants. The Supreme Court of Georgia noted that Magistrates considering the issuance of warrants are not to be confined by restrictions on the use of their common sense. Felker v. State, supra

at 371, citing United States v. Chester, 537 F.2d 173, 175 (5th Cir. 1976). Mizerly limitations will not be placed on the Magistrate's determination because probable cause does not involve certainty, but mere probability. See Ward v. State, 234 Ga. 882, 218 S.E.2d 591 (1975). See also Devier v. State, 247 Ga. 635, 637, 277 S.E.2d 379 (1981).

In the instant case, the Supreme Court of Georgia found that several warrants were issued for searches of the Petitioner's property because officers sought different things from different locations on each occasion. Felker v. State, supra at 369-371. After reviewing the affidavits in question, the Supreme Court found that the information contained within them

was sufficient to support the issuance of the warrants. Considering that the Magistrate did have a substantial basis for concluding that searches would uncover evidence of wrongdoing, Felker v. State, supra at 369, this Court should give great deference to the Supreme Court of Georgia's determination that the Magistrates's issuance of the warrants was proper. Illinois v. Gates, supra; Aguilar v. Texas, 378 U.S. 108 (1964). Accordingly, Respondent respectfully asserts that the Petitioner's allegation does not present any issue for review by this Court.

D. LAW ENFORCEMENT OFFICIALS PROPERLY SEARCHED THE PETITIONER'S PROPERTY PURSUANT TO THE WARRANTS ISSUED BY THE MAGISTRATE.

Petitioner contends that law enforcement officials impermissibly conducted general searches pursuant to the warrants issued by the Magistrate. In support of his contention, Petitioner alleges that lewd drawings in the Petitioner's possession were improperly seized by officers. Respondent contends that the officers were properly on the residence and only seized those items which were tangible evidence of the commission of a crime.

Although an officer may not rummage for evidence of a crime, the fact that the officer seizes items not named in the search warrant does not render the search invalid or unlawful. Jarvis v. Rubiano, 244 Ga. 735, 261 S.E.2d 645 (1979); Pass v. State, 227 Ga. 730, 183 S.E.2d 779 (1971). Items not named in the warrant may be seized because during a lawful search officers have a right to open any container that can reasonably hold the things being sought. See United States v. Ross, 456 U.S. 798 (1982); Cash v. State, 222 Ga. 55, 148 S.E.2d 420 (1966). Additionally, this Court has recently stated that it is not necessary that items seized under the plain view doctrine be

contraband. Texas v. Brown, ___ U.S. ___, 103 S.Ct. 1535, 1542, 75 L.Ed. 2d 502 (1983). In the instant case, the Supreme Court of Georgia properly determined that officers did not conduct a general search, but rather searched pursuant to a lawful warrant and only seized tangible evidence of the commission of a crime. Felker v. State, supra at 371.

Pursuant to their authorization, officers searched the Petitioner's property and found envelopes at both the Petitioner's house, and at his place of business. In the envelopes, they found lewd drawings of women in bondage. The drawings also depicted cocktail waitresses (the present victim, and a prior victim were both cocktail waitresses), and one of the

drawings bore a remarkable resemblance to the present victim. Considering that the officers lawfully searched the envelopes which could have contained items particularly named in search warrants, Felker v. State, supra at 369-370, and considering that the evidence contained therein, especially the drawing bearing a resemblance to the victim, were tangible evidence of the commission of a crime, the officers did not improperly seize any items introduced at trial. Accordingly, Respondent respectfully asserts that Petitioner's allegation does not present any issue for review by this Court.

E. THE SUPREME COURT PROPERLY DETERMINED THAT THERE WERE NO MATERIAL MISREPRESENTATIONS IN THE AFFIDAVITS PRESENTED TO THE MAGISTRATE.

Petitioner contends that material information was withheld from the Magistrate when law enforcement officials sought the issuance of warrants. Petitioner alleges that two members of the community reported seeing the victim alive after the time when the victim was last seen with Petitioner. Respondent contends that the Magistrate was provided with all material information germane to the issuance of the warrants.

At trial, Appellant sought to elicit testimony from witnesses which would indicate that the victim was alive after being seen with the Petitioner; however, no witness was able to state what day they saw the victim, or whether it was actually the victim. (T. 737, 741-742, 746, 747, 751-755, 758, 935). Petitioner feels that since he was able to secure witnesses who would testify that they may have seen someone who looked somewhat like the victim on a day somewhere near the time when the victim disappeared, this Court should hold that the information on which the warrants was based was false. Petitioner's contentions are based primarily on his theory of the case rather than on the facts and

circumstances surrounding the case. Because officers were not required to present to the Magistrate issuing search warrants Petitioner's theory of the case, especially when his theory is based wholly upon speculation and conjecture, the Supreme Court of Georgia properly determined that there were no misrepresentations associated with the affidavits presented to the Magistrate. Felker v. State, supra at 371. Accordingly, Respondent respectfully asserts that Petitioner's contention does not present any issue for review by this Court.

F. THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT FOR ANY RATIONAL TRIER OF FACT TO FIND THE PETITIONER GUILTY OF THE CRIMES CHARGED.

Petitioner contends that the evidence presented at trial was insufficient to support the jury's verdict. Respondent contends that evidence presented at trial, including scientific analysis of hair and fiber evidence, testimony of expert witnesses, admissions by the Petitioner, physical evidence, and testimony from a prior victim was sufficient to allow the jury to find the Petitioner guilty beyond a reasonable doubt.

The evidence presented to the jury is clearly and succinctly set forth in the Supreme Court of Georgia's opinion. Felker v. State, 252 Ga. 351, 351-359 (1984). The evidence outlined demonstrates that the Petitioner lured the victim to his home, tricked her into believing that she was to have dinner with he and his friends, then bound, raped, sodomized, and murdered the victim. After the murder, Petitioner lied to the police about whether the victim had ever been in his car; Petitioner's story changed when hair and fiber evidence was introduced at trial. Additionally, prior to the victim being found, the Petitioner threw away bondage equipment that he used on the victim and sought to concoct a false abili.

Lastly, when questioned about where he was the night the victim disappeared, Petitioner contended that he went out driving around the area looking for his girlfriend who would, supposedly, be standing outside in someone's yard during the early hours of the morning. Respondent contends, and the Supreme Court of Georgia found after a review of all evidence presented at trial, that the jury was authorized to find the Petitioner guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); Felker v. State, supra at 368-369. Accordingly, Respondent respectfully asserts that Petitioner's allegation does not present any issue for review by this Court.

G. PETITIONER DID NOT PROPERLY PRESENT HIS CONTENTION THAT JURIES ARE MORE INCLINED TO VOTE FOR THE DEATH PENALTY WHEN THE VICTIM IS WHITE THAN WHEN THE VICTIM IS NON-WHITE TO THIS COURT.

In Petitioner's last allegation, he contends that the death penalty in Georgia cannot be imposed even-handedly because juries are more inclined to vote for the death penalty when the victim is white than when the victim is non-white. Petitioner did not raise this contention prior to trial, at trial, or on appeal. This Court has stated that when a federal

question has never been raised, preserved, or passed upon in the state courts, this Court will not decide the issue for the first time on review of the state court decisions. Cardinale v. Louisiana, 394 U. S. 437 (1969). Accordingly, Respondent respectfully asserts that Petitioner's allegation does not present any issue for review by this Court.[2]

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[2]Respondent notes that in this allegation, Petitioner relies upon McClesky v. Zant, 580 F.Supp. 338 (N.D. Ga. 1984). However, the district court in McClesky v. Zant found that there was no evidence that the death penalty was not applied in an even-handed manner in Georgia.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia, as it is manifest that either there exists no federal question for review by this Court and, further, there is no substantial federal question not previously decided by this Court. Additionally, the decision sought to be reviewed is demonstrably in accord with applicable decisions of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, WILLIAM B. HILL, JR., a member of the bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States mail with proper address and adequate postage to:

S. Phillip Brown
Counsel of Record for Petitioner
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This 31st day of August, 1984.

William B. Hill, Jr.

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